United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

76-4179

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
p/s

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

VOLUME II

Pages 863 to 1608

OFFICE OF THE GENERAL COUNSEL
FEDERAL TRADE COMMISSION
Attorneys for the
Federal Trade Commission
Pennsylvania Avenue at
6th Street, N.W.
Washington, D.C. 20580

CAHILL GORDON & REINDEL
Attorneys for Petitioner
The Great Atlantic & Pacific
Tea Company, Inc.
80 Pine Street
New York, New York 10005

UNITED STATES COURT OF APPEALS
FILED
FEB 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

VOLUME I

Pleadings, Opinions, Orders
and Submissions of the Parties — Page*

1. Public Docket Sheets.................................... 1

2. Complaint.. 25

3. Answer of A&P... 31

4. A&P's Application for Vacation or Modification of Subpoena Duces Tecum, November 15, 1971................ 37

5. Borden's Request for Admission, August 7, 1972............ 46

6. Complaint Counsel's Reply to Borden's Request for Admission, August 17, 1972............................ 56

7. Complaint Counsel's Answer in Opposition to A&P's Motion to Dismiss the Complaint, October 20, 1972........ 66

8. Order of Administrative Law Judge, October 25, 1972 (re: A&P Motion to Dismiss Complaint)................ 96

9. Order of Federal Trade Commission, January 19, 1973 (re: A&P Motion to Dismiss Complaint)................ 101

10. Response of Borden to Request for Admissions, September 29, 1972..................................... 107

11. A&P's Amended Answer to Complaint Counsel's Request for Admissions, March 1, 1973...................... 109

12. A&P's Further Amended Answer to Complaint Counsel's Request for Admissions, March 12, 1973................... 111

13. Borden's Additional Response to Request for Admissions, March 15, 1973................................. 112

14. Order of Administrative Law Judge, September 16, 1974 (re: Cost Justification Exhibits)................ 114

---

* Pages 634, 636, 848, 850, 2470, 3020 and 3094 have been intentionally left blank.

Page

15. Complaint Counsel's Proposed Findings of Fact, Vol. II, May 19, 1975 (re: A&P's Cost Studies) 118

16. A&P's Proposed Findings of Fact, Vol. I, June 10, 1975 (Findings 203-14, 270-84, 388-402) 445

17. A&P's Proposed Findings of Fact, Vol. II, June 10, 1975 (re: A&P's Cost Studies) 478

VOLUME II

18. Complaint Counsel's Reply to Respondents' Proposed Findings of Fact, July 2, 1975.................... 863

19. Initial Decision and Order of the Administrative Law Judge, September 24, 1975............................ 914

20. Final Order and Opinion of the Federal Trade Commission, April 29, 1976..............................1017

21. A&P's Petition for Review, July 23, 1976..................1070

Transcript of Proceedings*

Witnesses for the Commission

1. Harry Archer (Borden)..................................1071

2. Albert Banaski (Bowman Dairy)..........................1092

3. Robert Barnes (Wallies Market).........................1094

4. Edward Barney (Model Food Center)......................1109

5. Ira Bartels (A&P)......................................1142

---

* The handwritten changes appearing in the portions of the transcript contained in this Appendix reflect the corrections in the transcript approved by the Administrative Law Judge in his "Order Correcting Transcript", dated September 23, 1975.

Page

6. R. John Bitting (FTC Accountant)....................1183
7. James Cox (Jim's Groceries)..........................1344
8. Glenn W. Gintert (Wilco Food Center).................1364
9. Orville Gose (Borden)................................1386
10. John Kalchbrenner (Bowman Dairy)....................1436
11. Richard L. Kristoff (Burger's Supermarket)..........1437
12. John M. Kuhlman (University of Missouri)............1482
13. Christopher Lasorso (Mayfair Foods).................1484
14. William R. Lemberg (FTC Accountant).................1520
15. Roy Marquardt (Borden Distributor)..................1561
16. Manley Minard (Joseph Tittle & Sons)................1578

VOLUME III

17. Ralph R. Minkler (Borden)...........................1609
18. Paul Peters (Model Food Center).....................1803
19. Richard Rouse (Borden)..............................1807
20. Walter Schaub (Scot Lad Foods)......................1836
21. Elmer Schmidt (A&P).................................1837
22. Rozella Seidl (Borden)..............................1933
23. Herschel Smith (A&P)................................1937
24. Donald Soberg (Wisconsin Bureau of Dairy Trade Practices).2058
25. Henry Soldwedel (Sidney Wanzer & Sons Dairy)........2062
26. Lyle Solverson (University of Southern Illinois)....2073
27. John Szczepaniak (Borden)...........................2108
28. Gordon Tarr (Borden)................................2123

Page

29. Scott A. Walker (FTC Economist)........................2196

30. John White (A&P)..2211

Witnesses for the Respondents

1. Robert Abrahms (Glen & Mohawk Milk Association)..........2235

2. Edmund R. Bayma (A&P)...................................2265

3. Frank T. Cannon, Sr. (Bowman Dairy).....................2280

4. William Corbus (A&P)....................................2391

VOLUME IV

5. Ronald Daube (Borden)...................................2400

6. Samuel E. Dean (Dean Foods).............................2417

7. Eugene Dischner (Borden)................................2424

8. D. McDonald Graham (University of Missouri).............2434

9. Robert G. Havemeyer (Case & Company, Inc.)..............2485

10. Jesse W. Markham (Harvard School of Business Administration).3091

11. LeGrove Miller (A&P)...................................3093

12. Joseph J. Pergler (Borden).............................3095

13. Earl Pilgrim (A&P).....................................3125

14. Charles Tise (Borden)..................................3127

Miscellaneous

1. John J. Mathias (Complaint Counsel).....................3173

2. Prehearing Conferences..................................3176

3. Colloquy..3178

INDEX TO EXHIBIT VOLUMES*

VOLUME V

Commission Exhibits — Page

CX 4 Haskins & Sells Wisconsin cost study........3201

CX 5 Borden letter, Minkler to Archer, Nov. 20, 1964...............................3206

CX 7 Borden letter, Minkler to Archer, Dec. 28, 1964...............................3208

CX 9 Borden letter, Minkler to Archer, Jan. 22, 1965...............................3216

CX 12 Borden letter, Minkler to Pentz, Feb. 9, 1965................................3217

CX 13 Handwritten Borden worksheets, Feb. 9, 1965................................3219

CX 14 Borden private label quote to A&P, Feb. 9, 1965................................3232

CX 16 Internal Borden notes, Feb. 9, 1965.........3237

CX 17 Handwritten Borden worksheets, May 25, 1965.3239

CX 18 Borden private label quote to A&P, May 25, 1965................................3260

CX 19 Internal Borden memorandum, May 26, 1965....3276

CX 20H Handwritten Borden worksheet, July 22,1965..3284

CX 21 Borden private label quote to A&P, July 26, 1965...............................3285

CX 23 Borden memorandum submitted to A&P, 1965....3306

CX 24 Borden schedules submitted to A&P, Aug. 4, 1965................................3315

CX 25A Borden table submitted to A&P, Aug. 3, 1965. 3323

---

* A large number of the exhibit pages received in evidence during the proceeding below are handwritten notes, memoranda and accounting worksheets and calculations. As a result, their legibility, both in their original form and even more so when reproduced for inclusion in this Appendix, is unavoidably impaired.

Page

CX 25 B-E Internal Borden memorandum, Aug. 6, 1965 3324

CX 26 Borden table submitted to A&P, Aug. 9, 1965 3328

CX 27 Borden table submitted to A&P, Aug. 9, 1965 3329

CX 28 Borden table submitted to A&P, Aug. 9, 1965 3330

CX 30 A&P memorandum, Schmidt to Bartels, Aug. 2, 1965 3331

CX 31 A&P memorandum, Schmidt to Bartels, Aug. 6, 1965 3332

CX 34 Internal A&P memorandum, Aug. 11, 1965 3334

CX 35 Internal Borden memorandum, Aug. 13, 1965 3335

CX 36 Borden private label quote to A&P, Aug. 13, 1965 3337

CX 37 Borden calculation of private label savings to A&P, Aug. 13, 1965 3371

CX 42 Internal Borden memorandum, Aug. 16, 1965 3377

CX 43 Internal Borden memorandum, Aug. 18, 1965 3381

CX 45 Internal A&P memorandum, 1965 3384

CX 50 Bowman private label quote to A&P, Aug. 31, 1965 3385

CX 51 Dean private label quote to A&P, Aug. 27, 1965 3407

CX 53 Internal Borden notes, Sept. 1, 1965 3410

CX 54 Handwritten Borden worksheets, Sept. 2, 1965 3412

CX 55 Internal Borden memorandum, Sept. 3, 1965 3414

CX 56 Borden private label quote to A&P, Sept. 14, 1965 3419

Page

CX 58 Internal Borden memorandum, Sept. 17, 1965.....3443

CX 62 Borden private label quote to A&P, Sept. 21, 1965.....3445

CX 63 Internal Borden memorandum, Sept. 22, 1965.....3473

CX 64 Borden letter, Minkler to Pentz, Sept. 23, 1965.....3477

CX 65 A&P comparison of private label quotes, 1965.....3479

CX 66 A&P memorandum, Schmidt to Bartels, Sept. 28, 1965.....3481

CX 70 A&P memorandum, Carver to Schmidt, Oct. 14, 1965.....3483

CX 71 Internal Borden memorandum, Oct. 14, 1965.....3485

CX 72 Internal Borden memorandum, Oct. 15, 1965.....3487

CX 75 A-J Portion of Borden's final private label quote to A&P.....3489

CX 75 P-T Borden letter, Minkler to Pentz, Dec. 7, 1965.....3499

CX 75U Internal Borden memorandum, Dec. 1965.....3504

CX 75 V-X Internal Borden memorandum, 1965.....3505

CX 75 Z(1)-Z(3) Borden letter, Minkler to Pentz, Jan. 3, 1966.....3508

CX 79 Internal Borden memorandum, May 25, 1966.....3511

CX 80 Internal Borden memorandum, May 25, 1966.....3512

CX 81 Internal Borden memorandum, May 27, 1966.....3514

CX 87 Handwritten Borden Worksheets, June 19, 1966.....3515

		Page
CX 90	Internal Borden memorandum, June 29, 1966	3518
CX 94	Dean private label quote to A&P, Jan. 24, 1967	3523
CX 95	A&P comparison of private label prices, 1967	3535
CX 96	Internal A&P notes, 1967	3536
CX 97	Dean private label quote to A&P, Feb. 27, 1967	3537
CX 98	Dean private label quote to A&P, Feb. 28, 1967	3546
CX 102	Borden letter, Gose to Schmidt, Mar. 13, 1967	3549
CX 103 D-F	Borden letter, Gose to Schmidt, Mar. 21, 1967	3552
CX 105	Borden letter, Gose to Schmidt, Mar. 30, 1967	3555
CX 110	Internal Borden memorandum, Apr. 4, 1967	3559
CX 119	Borden union contract	3563
CX 123	Borden discount schedule, Jan. 3, 1966	3571
CX 124	Borden price list, Feb. 7, 1966	3574
CX 125	Borden price list, May 26, 1966	3577
CX 137	Borden price list, Oct. 13, 1964	3579
CX 138	Borden discount schedule, Jan. 1, 1966	3580
CX 139	Borden price list, Feb. 2, 1966	3581
CX 153	Borden prices to A&P, 1965-67, Chicago-Calumet	3585
CX 154	Borden prices to A&P, 1965-67, West Central Indiana	3625

Page

CX 155 Borden prices to A&P, 1965-66, Rock Island....3651

CX 180 FTC Doc. - A&P private label purchases, Aug. & Oct. 1966....3669

CX 182 FTC Doc. - Comparison of sales of A&P and Borden customers in Indiana, Oct. 1966 - Mar. 1967, June 1969 - Mar. 1970.3671

CX 183 FTC Doc. - Sales and discounts to Borden customers in Illinois, Feb. & Mar. 1966.3673

CX 185 FTC Doc. - A&P purchases of private label items in private label and Borden label, Nov. 1965 - Dec. 1968....3677

CX 187 FTC Doc. - Alleged discount and discrimination, Borden's Indiana customers.....3678

CX 188 FTC Doc. - Burger's Supermarket, alleged discrimination....3679

CX 191 FTC Doc. - Model Food Center, alleged discrimination....3718

CX 194 FTC Doc. - Joseph Tittle & Sons (Highland), alleged discrimination......3757

CX 195 FTC Doc. - Joseph Tittle & Sons (Hohman Ave.), alleged discrimination...3796

CX 196 FTC Doc. - Joseph Tittle & Sons (Lake St.), alleged discrimination......3812

VOLUME VI

CX 197 FTC Doc. - Joseph Tittle & Sons (Village Court) alleged discrimination..3851

CX 198 FTC Doc. - Joseph Tittle & Sons (Valparaiso), alleged discrimination....3890

CX 200 FTC Doc. - Wallies Market, alleged discrimination....3929

CX 202 FTC Doc. - Wilco Food Center, alleged discrimination....3959

CX 206 Borden profit and loss statement, Jan. 1965 - Aug. 1966....3998

		Page
CX 211D	Page from Borden's 1964 Annual Report..	4002
CX 216	Pages from A&P's 1964 Annual Report.....	4003
CX 217	Pages from A&P's 1965 Annual Report.....	4006
CX 218	Pages from A&P's June 1966 prospectus...	4009
CX 219	Pages from A&P's 1966 Annual Report.....	4012
CX 221	Page from A&P's 1968 Annual Report.....	4014
CX 252	FTC Doc. - A&P's margin on half-gallon milk..................................	4015
CX 255	FTC Doc. - A&P's wholesale cost and retail prices for selected milk products, 1965-1968.............................	4019
CX 256	A&P retail price book pages.............	4021
CX 258	A&P organization chart..................	4075
CX 260	Excerpts from Minkler deposition, Dec. 1971............................	4076
CX 262	Malone deposition, Feb. 9-10, 1972......	4086
CX 263	A&P letter, Bartels to Smith, Oct. 1, 1965...............................	4295
CX 264	FTC investigational subpoena to Borden.................................	4335
CX 265	Borden rebate memoranda, Indiana customers, Oct. - Dec. 1966.............	4343
CX 288	Borden rebate worksheets, Indiana customers, 1966, 1969..................	4364
CX 289	Borden special sales expense requests, Jan. - Mar. 1970.......................	4388
CX 290	Borden interest refunds to Wilco........	4391
CX 293	U.S. Dept. of Agriculture publication...	4392
CX 298	Borden union agreement, Indiana, 1963-1965............................	4395

Page

CX 299 Borden union agreement, Indiana, 1965-1967....4412

CX 300 Borden union agreement, Indiana, 1967-1970....4433

CX 302 A&P internal memorandum, Nov. 15, 1971....4451

Respondent A&P Exhibits

RA&PX 2 Borden letter, Tarr to Schmidt, Oct. 1, 1965....4460

RA&PX 3 Borden letter, Minkler to Pentz, Oct. 1, 1965....4461

RA&PX 7 Excerpts from Tarr deposition, Dec. 1971....4462

RA&PX 9 Wisconsin Dept. of Agriculture publication....4472

RA&PX 16 Borden letter to A&P, Aug. 3, 1967....4483

RA&PX 17 Borden letter to A&P, Aug. 8, 1967....4484

RA&PX 18 Borden letter to A&P, Sept. 2, 1967....4485

RA&PX 29 Rebates and interest subsidies received by Tittle from Borden....4487

RA&PX 32 Weekly billing, fluid milk purchases, Feb. 2, 1966, Chicago and suburbs....4491

RA&PX 35 Stipulation - Services received by Borden's non-A&P Illinois customers....4492

RA&PX 36 Stipulation - Services received by Borden's non-A&P Indiana customers....4496

RA&PX 38 Respondents' retail store subpoena....4501

RA&PX 39 Respondents' dairy subpoena....4508

VOLUME VII

RA&PX 40 Borden memorandum re: Woodstock plant....4523

RA&PX 41 Borden Doc. - plant processing costs, 1965....4568

Page

RA&PX 42 Borden private label quote to A&P, Apr. 20, 1971 4569

RA&PX 43 Dean private label quote to A&P, Oct. 19, 1971 4583

RA&PX 44 Spinney Run private label quote to A&P, Sept. 16, 1971 4589

RA&PX 45 Borden letter Wagner, to Bayma, June 23, 1971 4593

RA&PX 46 Borden letter, Wagner to Bayma, Nov. 11, 1971 4594

RA&PX 47 A&P Doc. - Gross Profits, Expenses and Net Profits as a Percentage of Sales, 1965-66 4595

RA&PX 50 Bowman private label proposal to A&P, Aug. 31, 1965 4596

RA&PX 51 Final Judgment, United States v. Bowman, Apr. 24, 1963 4619

RA&PX 53 Stipulation - Illinois statutes re: milk processing 4626

RA&PX 55 Stipulation - Chicago Board of Health regulations re: milk processing .... 46[illegible]

RA&PX 58 Stipulation - Expected testimony, Ray Tittle, Jr. 4695

RA&PX 59 Stipulation - Letters between Borden and A&P's Indianapolis Division buyer 4700

RA&PX 62 Glen & Mohawk private label proposal to A&P, May 1964 (Albany, N.Y.) 4710

RA&PX 63 Glen & Mohawk private label proposal to A&P, May 1964 (Westchester County, N.Y.) 4711

RA&PX 64 Glen & Mohawk private label proposal to A&P, Apr. 1965 (Boston) 4712

Page

RA&PX 65 Borden Doc. - rented dairy production expense, May 1965........................4713

RA&PX 66 Borden Doc. - A&P private label pricing procedure..............................4715

RA&PX 67 Borden Doc. - accounts & subaccounts, Mar. 1966..................................4750

RA&PX 68 Borden Doc. - location numbers of accounts, May 1965, Mar. 1966...........4801

RA&PX 69 Borden Doc. - summary of operation by business type, 5th period 1965..........4802

RA&PX 70 Borden Doc. - sales & expenses by business type, 5th period 1965..........4803

RA&PX 71 Borden Doc. - expense ledgers, May 1965.4805

RA&PX 72 Borden Doc. - final expense summaries, Mar. 1966.................................5023

RA&PX 74 Borden Doc. - O'Hare Branch customers, average daily points, Mar. 1965, May 1965.............................. 5087

RA&PX 75 Borden Doc. - fluid milk sales, May 1965, Mar. 1965, Oct. 1969..............5088

RA&PX 76 Borden Doc. - wholesale points, Mar. 1965, May 1965, Nov. 1965, Mar. 1966..............................5091

RA&PX 78 Borden Doc. - data re: containers/case, July 1971..............................5095

RA&PX 80 Borden Doc. - operating statement, Hammond Branch, Oct. 1969 (regular).....5906

RA&PX 81 Borden Doc. - operating statement, Hammond Branch, Oct. 1969 (distributor) .5097

RA&PX 82 Borden Doc. - operating statement, Hammond Branch, Oct. 1969 (trailer runs).5098

RA&PX 83 Borden Doc. - operating statement, Hammond Branch, Oct. 1969 (total milk).. 5099

Page

RA&PX 85 Borden Doc. - expense summary, Hammond Branch, Oct. 1969 (selling, milk wholesale)............................5100

RA&PX 87 Borden Doc. - expense summary, Hammond Branch, Oct. 1969 (delivery, dairy broker)...............................5101

RA&PX 90 Borden Doc. - advertising expenditures, Oct. 1969...............................5102

RA&PX 92 Borden worksheets - drivers commissions, Hammond Branch, Oct. 1969...............5103

RA&PX 100 A&P Doc. - Comparison of Borden and Bowman quotations.......................5105

RA&PX 101 A&P Doc. - Geographic comparison of Borden and Bowman quotations............5106

RA&PX 102 A&P Doc. - Indiana A&P stores in Borden and Bowman quotations............5109

RA&PX 103 A&P Doc. - Raw milk price increase adjustment...........................5130

RA&PX 104 A&P Doc. - Bowman prices in Indiana.....5134

RA&PX 105 A&P Doc. - Borden prices for items offered by Bowman.......................5138

RA&PX 108 A&P Doc. - list price values of A&P milk line.................................5143

RA&PX 129 American Dairy Review article re: Woodstock dairy plant, July 1965........5157

RA&PX 130 Food Engineering article re Woodstock dairy plant, Sept. 1965.................5163

RA&PX 131 Borden publication re Woodstock dairy plant...................................5166

Page

VOLUME VIII

RA&PX 133* Borden's processing formulas, June 1966 5174

RA&PX 134* Borden's processing formulas, Nov. - Dec. 1968 5177

RA&PX 135 Letters verifying respondents' store subpoena returns 5179

RA&PX 136 Letters verifying respondents' dairy subpoena returns 5302

RA&PX 137 Comparison of A&P private label prices and the 2-2-2 formula 5412

RA&PX 170 A&P Doc. - Cost analysis, Mayfair Foods (O'Hare Branch) 5414

RA&PX 173 A&P Doc. - Cost analysis, James Cox (O'Hare Branch) 5420

RA&PX 187 A&P Doc. - Borden's cost to serve A&P's Valparaiso, Ind. store 5560

RA&PX 221 A&P Doc. - Net balance due, Borden's Hammond customers 5563

RA&PX 232 A&P Doc. - Profit & loss evaluation of Borden private label proposal of Sept. 21, 1965 5565

VOLUME IX

RA&PX 233 A&P Doc. - Cost analysis, O'Hare Branch (Illinois), Mar. 1966 5682

RA&PX 234 A&P Doc. - Cost analysis, Hammond Branch (Indiana), Oct. 1969 5758

RA&PX 236* Sandusky Affidavit re: Borden's processing formulas 5874

---

* Portions of RA&PX 133, 134 and 236 are *in camera* until Aug. 23, 1977 (unless extended by order of the Commission) pursuant to an Order of the Administrative Law Judge, dated Aug. 29, 1974. (See Volume X (In Camera Exhibits), pp. 6379-6383)

Page

RA&PX 239 Stpulation - store subpoena returns........5881

RA&PX 240 Stipulation - dairy subpoena returns.......5892

RA&PX 241 Stipulation - Jewel subpoena return........5894

RA&PX 245 Case & Co. studies: North Carolina, South Carolina & Virginia..................5898

RA&PX 246 A&P Doc. - Revised comparison of Borden and Bowman proposals................6000

RA&PX 248 A&P Doc. - Borden's price to A&P on certain promotional items................6002

RA&PX 250 Dean - A&P correspondence re: 1971 milk solicitations..........................6004

RA&PX 251 Borden - A&P correspondence re: 1971 milk solicitations..........................6018

RA&PX 252 Spinney Run - A&P correspondence re: 1971 milk solicitations.....................6027

RA&PX 253 A&P letter re private label milk solicitation, 1971..........................6031

Respondent Borden Exhibits

RBX 1 Borden proposal to Kroger, July 29, 1968..............................6032

RBX 5 Borden proposal to Eagle, Sept. 12, 1968..............................6042

RBX 22 Borden proposal to National Tea, Nov. 1968..................................6065

RBX 23 Borden prices to K-Mart stores, Hammond, Ind., Nov. 1967...................6086

RBX 24 Respondents' Feb. 1973 subpoena to Jewel....................................6088

VOLUME X

In Camera Exhibits

CX 184 Tax returns & FTC summary, Mayfair Foods, Jim's Grocery...............6094

		Page
CX 189	Tax returns, financial statements & FTC summary, Burger's Supermarket..	6118
CX 192	Tax returns & FTC summary, Model Food Center....................	6263
CX 199	Financial statements & FTC summary, Joseph Tittle & Sons.................	6287
CX 201	Financial statements & FTC summary, Wallies Market......................	6305
CX 203	Tax returns & FTC summary, Wilco Food Center....................	6310
RA&PX 133	Borden's processing formulas, June, 1966...........................	6379
RA&PX 134	Borden's processing formulas, Nov. - Dec. 1968.....................	6380
RA&PX 236	Sandusky Affidavit re: Borden's processing formulas..................	6382

G. A&P's Arguments Concerning Cost Justification

Respondent A&P in its various arguments related to the question of cost justification has basically taken three positions. First, that contemporaneous internal accounting computations by Borden's cost expert, Mr. Joseph Malone, were erroneous and unreliable. Secondly, it urges that complaint counsel have not carried the alleged burden of proving that the price discriminations were not cost justified. Third, it maintains that the calculations of Mr. Robert Havemeyer embodied in RAPX 232 through 234 reveal that the Borden-A&P contract was a profitable one for Borden and that the price discriminations admittedly flowing therefrom were cost justified. All of these positions are simply incorrect.

The Borden Internal Cost Calculations:

The internal cost calculations referred to by A&P are principally CX 54B and CX 87A-C, both of which were prepared by Mr. Malone.

1. CX 54B. CX 54 was prepared by Joseph Malone, Borden's cost expert, at a very critical point in the negotiations between Borden and A&P. Borden had just been notified that a competitor or competitors had submitted an offer to A&P that was way below Borden's offer. Schmidt had told Tarr to "go back and figure out what the account is worth to you." (Tarr. Tr. 874; CX 53A). Borden was in a state of panic, it could not lose the A&P business and the only lead it had on the competitive

price was that $50,000 additional savings "would not be a drop in the bucket." (Minkler, Tr. 225-226; CX 53A-B).

Borden was of the opinion, and had so-informed A&P that the competitive bid was based on "anyhow accounting," that is, on the basis of direct costs only. (Minkler, Tr. 237-239, 376-377; Tarr, Tr. 878, 961-962; CX 260). Accordingly, Mr. Malone sat down to calculate how much additional savings would have to be offered to A&P in order to put Borden's price at the level of its direct costs only. That calculation is CX 54B. (CX 55; CX 54; Borden Proposed Findings, p. 59).

The record clearly shows, and Borden freely admits in its proposed findings (page 59), that on the basis of this calculation Borden decided to lower its price to A&P to approximately a direct-cost-only level and to double A&P's proposed savings from $410,000 to $820,000. (CX 55; RBF p. 59).

Thus it can be seen that this was a critical and supremely important document. Its calculations could not have been taken lightly by Mr. Malone. Moreover, the record clearly shows that Mr. Malone's expertise in the area of Borden's costs is unquestionable. There can be no doubt that he had a "rapport" with Borden's records. (Malone, DTr. 149).

Now then, what are the criticisms of this document by A&P? First, that Mr. Malone has allocated the costs on a "per-point" or "averaging" basis, rather than on the individual packages (quart, half-gallon, gallon, etc.) involved. Secondly, that the calculations are not directed specifically to A&P sales and are only general estimates. Thirdly, that such costs do not represent a detailed cost accounting approach. And lastly, the "bootstrap" argument that they are not in accord with Mr. Havemeyer's calculations or CX 4, the so-called Milwaukee study. (RAPF, pp. 190-195). None of these arguments will hold water.

First of all, the point system of accounting is deeply ingrained in the dairy industry. Discounts and pricing proposals revolved around the number of points delivered, not the quantity of individual items delivered. (CX 94A, 97B, 120, 138, 152; RAPX 42-44). Commissions paid to deliverymen were likewise based on the number of points delivered, not on the quantity of individual items delivered. (CX 119H-0; CX 298-300).

The reasons for the dependence on the point system are quite easy to see. The high point value items which do not correspond exactly with the quart, half-gallon and gallon of homogenized milk are the higher-priced, lesser volume by-products. (RAPX 66, p. 7). These items are more expensive and they are more costly to handle, since they are handled in such small volumes. At every point of their processing, storage and distribution, it is quite clear that these low volume items

need more attention and more particular handling. (See for example CX 7A). The point system of cost allocation makes allowance for this obvious fact. Mr. Havemeyer's system of determining the cost per case and then simply dividing the number of pints of half and half for example, into that case does not make such allowance.

Moreover, the question of averaging (basing on point value) is really a straw-man in this controversy. It ignores the true nature of Mr. Malone's calculation. */ The only question here is whether he accurately determined the level of direct costs which he was seeking. If he has selected the correct over-all costs and related them to A&P volume, then it matters little whether or not the exact cost is assigned precisely to each unit. Obviously, the accurate selection of the total cost incurred by Borden for each function is of paramount importance.

This brings us to A&P's second objection that these calculations are not related to A&P sales. Such statement is simply a mis-statement of the records. Mr. Malone did testify that these calculations were "general estimates of cost which would relate to the functions involved." (Malone, DTr. 149).

---

*/ Moreover, it even ignores the accounting results involved. If A&P's criticism were correct in connection with glass gallons, it would mean that Mr. Malone had understated the costs on this item, which would mean that the direct costs were in turn understated. This would mean that Borden's bid would be even further under its total costs.

But he also admitted that these calculations were based upon the volume of business Borden was doing with A&P. (Malone, DTr. 150-151). */ And more specifically, the expected private label volume, if A&P made a 100% conversion. (Malone, DTr. 148, 151). Obviously, it would not suit Borden's critical purposes at this point to be dealing with figures that bore no relationship to the A&P business. Under such circumstances the calculations would be meaningless and Borden would certainly lose the A&P business. **/

Further, the argument that this calculation does not constitute a detailed cost-accounting approach is also without merit. It certainly was unnecessary for the purpose of obtaining reasonable accuracy to run a full and detailed cost analysis, with possibly a time and motion study, under the circumstances involved here. Mr. Malone did not need to be familiarized with Borden's cost experiences. As noted above, he had a "rapport" with Borden's records based on his experience over many years. (Malone, DTr. 149). With the then current A&P volume figures at his command and the Borden cost records, he was able to determine the specific costs with which he was concerned. (Malone, DTr. 146-149, 150-151).

---

*/ In connection with a specific question related to "credit and collection." one of the "burden" costs listed at the bottom of CX 54 which was not included in his basic computation (Malone, DTr. 147-148), Mr. Malone did indicate that the listed expense might not reflect an expense of dealing with A&P. (Malone, DTr. 149-150).

**/ Even the title of this document reveals its relationship to the A&P business. It is entitled "Re: A&P Private Label Development of Estimated Cost Data and Comparison of Unit Costs With Bid Quotation." (CX 54A).

Finally, A&P argues that CX 54 is inaccurate because it disagrees with Mr. Havemeyer's study and CX 4. The disagreement with Mr. Havemeyer's study is hardly surprising. With all of the inaccuracies, unsupported assumptions and improper bases of Mr. Havemeyer's studies, as well as the fact that they were based on superficial book audits for only one month, all of which is discussed in great detail in Volume II of our proposed findings, one would not expect them to agree with an informed calculation of Borden's costs, especially since the Havemeyer studies were forged in the heat of litigation. The disagreement with figures in CX 4 is equally understandable.

CX 4A-E was a study prepared by Borden Co. and reviewed by Haskins & Sells pertaining to Borden's operations in Madison and Milwaukee, Wisconsin in connection with an inquiry by the State of Wisconsin. (CX 4A-B). The cost figures therein relate to the month of August 1964, over a year prior to the calculations in CX 54B. (CX 4A-E). Thus, CX 4A-E relates to entirely different market areas than that considered in CX 54B and the time periods of the two studies do not coincide.

The fact that they are neither contemporary nor based on the same market areas renders any comparison meaningless. For instance, Mr. Schaub (whom A&P adopted as its own witness) testified that "the highest labor rates are in this area [Chicago] as against all other dairy rates that we know of in the United States." (Schaub, Tr. 3305). (Emphasis added). Thus, the areas are not comparable on the basis of this record. A&P in its own findings states "During 1964-1968, there were annual labor cost increases every year and several increases in packaging costs." (RAPF, p. 381). Thus, the time factor is equally as damaging to A&P's position. */

Moreover, it must not be forgotten why CX 4A-E was prepared. This document was prepared by Borden and submitted to the State of Wisconsin in connection with a controversy with the officials of that State. (Soberg, Tr. 2765-2768; CX 4B). Thus, it is, in effect, a document prepared for litigation. The document was prepared to show that the discounts Borden was granting were justified (above cost) and that the differential between Borden label and private label in Wisconsin was cost justified. (Soberg, Tr. 2767). **/ It can be expected that this document would be designed to show Borden's costs as low as possible.

Accordingly, it is most inappropriate to judge CX 54 on the basis of either Mr. Havemeyer's calculations or CX 4.

---

*/ Moreover, Mr. Malone, who was the man who submitted CX 4 to the State of Wisconsin, has stated without contradiction that "there is no relationship between the Chicago factors and the Wisconsin factors." (CF-II, pp. 14-15).

**/ The differential between the two labels in Wisconsin was far lower than that in Borden's final proposal to A&P. (Compare CX 4D and CX 62C).

The best indicia of its accuracy is the identity of its preparer and the crucible in which it was formed. It was prepared by an undisputed and internal cost expert of Borden under critical business pressures. It had to be accurate to be of any value to Borden and it was. Rather than judging the accuracy of CX 54 by Mr. Havemeyer's computations, it can only be appropriate to reverse the procedure and judge the accuracy of Mr. Havemeyer's work by this yardstick.

In this latter regard, it is again pointed out, as in our Proposed Findings Volume II, that a casual inspection of CX 54 and the various calculations of Mr. Havemeyer in RAPX 232, reveals that Mr. Malone was dealing with higher over-all cost figures than those selected by Mr. Havemeyer. [CF-II, Findings 9(b)(xi), 9(c)(iv), 9(e)(i), and 9(f)(ii) and (xvi)]. Naturally if you start out by understating the total costs for a particular function, you are going to get a lower unit cost.

In short, the criticisms of CX 54B are simply erroneous and unfounded. The record evidence in this case can support only CX 54 as a reliable estimate of costs for the time period prepared. Moreover, its accuracy is richly attested to by the next exhibit to be discussed, CX 87, which was prepared in June 1966, about 8 months after sales under the private label program began. That exhibit shows that under two separate cost accounting bases, Borden was selling private label to A&P at prices below its costs.

2. CX 87A-C. CX 87 is another calculation prepared by Mr. Malone at a critical period in the Borden-A&P dealings (some 10 months after the preparation of CX 54). A&P had just refused Borden's request for a price increase based upon increases in labor fringe and container costs. (CX 90B). Mr. Malone again computed out the profit position of Borden in its dealings with A&P, as well as the effect on Borden if it lost the A&P account. (CX 87A-C). Mr. Malone calculated out such cost experiences by two different accounting methods and, in each case, determined that Borden was selling private label to A&P at a loss. (CX 87A-B). */

A&P attacks this document basically on two grounds: First, that it does not relate specifically to Borden's cost of serving A&P; and secondly, that the average value of sales per point shown for all private label sales for the week of May 28, 1966 on CX 87A-B is .0104 lower than that computed by Mr. Havemeyer for the O'Hare Branch A&P stores for March 1966. A&P also urges rather weakly that the exhibit

---

*/ In the one instance (CX 87A) he did find a slight profit (2 mills per point) in Borden's overall sales to A&P of both Borden and A&P label. In the other instance he found that there was a loss (4 mills per point) even on the overall sales. The loss on private label was in the first case, a little over a half cent per point and, in the second case, 1.12 cents per point.

is suspect because it shows different amounts for certain costs under the two different calculations, and because the delivery costs shown therein are higher than in CX 54B. (RAPF, pp. 196-200). All of these arguments are again simply groundless.

First, as to the allegation that CX 87 does not relate specifically to the cost of serving A&P. Respondent A&P's citations to the record on p. 196 of its brief are highly misleading at best. The allegation that Borden made no studies of its costs of serving A&P specifically, cites to p. 240 of the Malone deposition transcript. At that point Mr. Malone is discussing an entirely different exhibit -- CX 13. Moreover, the citation to that portion of the transcript where Mr. Malone was discussing CX 87, omits a very material part of that quotation. The full statement, with omitted parts underlined, is as follows:

> *The three documents representing 87A, B and C, were developed in an attempt to reconcile our position as to which would be the best course to folow. Number one, we had the experience with the A&P private label operation and we* wanted to see on a general application of the elements of cost, what our position would be, *either lose or gain, and relate that to where we would be* if we lose all of the business. (Malone, DTr. 184-185).

As it can be seen from this language, these calculations were based on Borden's experiences under the private label program. Moreover, the calculations themselves clearly reveal their specific application to A&P's private label sales. The prices and costs are specifically related to the A&P volume, pricing, and service. (CX 87A-B). The very fact that Mr. Malone had variations in some of the delivery costs as between the two allocation methods employed on CX 87A-B, reveals that he could not have been dealing with some average, general cost figure which would be applied to all customers. He determined the cost of serving A&P on two separate hypotheses in a manner which could only be directly related to A&P. */ Under the circumstances, A&P's argument that these figures do not relate specifically to Borden's experiences with A&P private label is a clear misconstrual of the record.

<ins>*/</ins> A&P weakly argues that it has been denied due process since it allegedly has not been able to ascertain the underlying data upon which this exhibit was based. Yet, A&P had the opportunity to cross-examine Mr. Malone concerning this obviously important document <ins>and did not choose to do so</ins>. (Malone, DTr. 229-250). <ins>It cannot now claim prejudice</ins> as the result of its own failure to cross-examine.

As to the argument that the average price per point Borden charged A&P for private label was understated in CX 87, this is (to borrow a phrase from A&P) pure legerdemain. In this argument (RAPF, pp. 198-200), A&P compares the average price per point for the O'Hare Branch in March 1966, as computed by Mr. Havemeyer in RAPX 233, with the average price per point computed by Mr. Malone for all A&P stores during the week of May 28, 1966. There is simply no way such a comparison could be meaningful. The record clearly shows that the O'Hare Branch is in the highest price area covered by the Borden-A&P contract. (CX 62). Any averaging of prices between these stores and the lower price market areas will, of necessity, reduce the average price below that existing within the O'Hare Branch. Thus, A&P's argument is at best facetious.

Finally, A&P's passing comment concerning the fact that delivery costs are higher in CX 87 than in CX 54 (RAPF, pp. 197-198) is even more facetious. The reason for the preparation of CX 87 in the first place was that Borden had, in the interim period, experienced delivery cost increases. (CX 90B). Certainly, the delivery costs would therefore be expected to be higher.

Thus again, the arguments of A&P fade away under the light of the record. Again the contemporary nature of this document, coupled with the reasons for its preparation and the identity of its preparer make it a highly reliable and probative piece of evidence. It should be accorded great weight.

Complaint Counsel's Burden of Proof:

A&P also argues that complaint counsel have not proven that the price discriminations were not actually cost justified and that, therefore, we have not carried the burden of proof required under Section 2(f) of the amended Clayton Act. (RAPF, pp. 298-311). A review of complaint counsel's proposed findings, especially Findings 82 through 91, 99 through 103 and 105, reveals that such allegation is just not true. However, A&P's position also grossly misconstrues the evidential burden of complaint counsel. Although in this case our evidence actually does prove conclusively that the price discriminations in favor of A&P were actually not cost justified, we were not under the legal duty to produce such explicit evidence.

The Commission has spelled out complaint counsel's burden of proof in its interlocutory order in Suburban Propane Gas

BEST COPY AVAILABLE

Corporation, D. 8672, 71 FTC 1695, 1698-1699, n. 2 (1967).

Therein it points out:

> "Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, the Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor . . . However, assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden." */

The evidence of record cited in Findings 82 through 91, 99 through 103 and 105, in Volume I of our Proposed Findings, certainly goes far beyond this burden of proof.

---

*/ Citing to Automatic Canteen Co. of America v. Federal Trade Commission, 346 U.S. 61 (1953); Fred Meyer, Inc., D. 7492, aff'd 359 F.2d 351 (9th Cir. 1966), cert. denied on this ground 87 S. Ct. 851 (1967). National Parts Warehouse et al., D. 8039, 63 FTC 1692 (1963), aff'd General Auto Supplies Inc. v. F.T.C., 346 F.2d 311 (7th Cir. 1965); D&N Auto Part Co., 55 FTC 1279 (1959), aff'd Mid-South Distributors v. F.T.C., 287 F.2d 512 (5th Cir. 1961), cert. denied 368 U.S. 838 (1961).

Moreover, a comparison of the evidence in this case with the evidence relied upon by the Commission and the Courts in finding a violation of Section 2(f) of the amended Clayton Act by Kroger Co. in the Beatrice-Kroger case reveals conclusively that complaint counsel have more than met their burden of proof. In that case, the Commission reiterated its criteria from the Suburban Propane order cited above, and affirmatively found that complaint counsel had met their burden. [See Beatrice Foods Co., et al., 76 FTC 719, at pp. 820-821 (1969)]. */ In that case the Commission basically relied upon Kroger's market knowledge, the fact that it did not seek evidence of cost justification from the various bidders, and the fact that Beatrice's pricing to Kroger was on a cost-plus basis, whereas Beatrice was selling to competitors on a list price-minus discount basis which was not based upon actual costs. (Supra, at pp. 820 and 821).

In the present case we have almost the same elements of proof, plus much more. (See CF 86 and 84). For instance in the Beatrice-Kroger case there was no communication between

---

*/ aff'd sub-nom., Kroger Co. v. Federal Trade Commission, 438 F.2d 1372 (6th Cir. 1971), cert. denied 404 U.S. 871 (1971).

the parties concerning cost justification. In the present case, not only did Borden submit detailed cost data, but in tendering its final offer, Borden informed A&P that it could only be justified on the basis of a meeting of competition. (CF 82 and 84). This and a review of the other cited findings will show conclusively that the weight of the evidence is far greater in the present case than in Beatrice-Kroger. Since the Commission found affirmatively in that case that complaint counsel had met their burden of proof and that finding was affirmed by the Courts, it is then axiomatic that complaint counsel's burden has been met in the instant case.

A&P's Cost Studies:

Insofar as the efficacy and reliability of the three cost studies of Mr. Havemeyer are concerned, complaint counsel will stand firmly behind the record as summarized in Volume II of their Proposed Findings. It is quite clear that Mr. Havemeyer's studies do not constitute reliable, probative and substantial evidence in light of the many errors, inconsistencies, inadequate analyses and failures to provide substantiating evidence as noted in Findings 6 through 31 in Volume II. There is frequently inadequate, or no, substantiating evidence for his allocations. He has failed to make an adequate study of Borden's records and operations. His allocations also ignore important facts which would materially affect his computations. It is quite obvious that his admitted ignorance of Borden's operations and its bookkeeping procedures have had a devastating effect on his calculations. In addition to these most basic errors, Mr. Havemeyer has also: failed to properly classify the various store customers; determined A&P store costs improperly on an average store basis; failed to consider countervailing costs that may have been incurred for A&P alone; and allocated costs in a manner other than that in which they were incurred. He also ignored the fact that certain service provisions were not equally "available" to A&P's competitors and that, therefore, any difference was not one of "difference in service," but rather, a "difference in availability." And lastly, his studies are conducted in such a manner that, in any event, they are limited in time and scope to only the individual months for which they were prepared and cannot possibly be applied to the entire periods of discrimination, as proven in complaint counsel's case-in-chief.

Furthermore, in this section of A&P's findings, it has not only misconstrued and mis-stated the record, but it has also deliberately contravened the clear and explicit Orders of the Judge.

COMPLAINT COUNSEL REPLY TO RESPONDENTS' PROPOSED FINDINGS OF FACT

1. Wisconsin Time Standards: A&P has inserted in its findings what it refers to as the "Wisconsin time standards" and thus arrives at a conclusion concerning the amounts of time required to serve each of the stores in the Chicago and Hammond areas. (RAPF, Findings 541-565, 598-600, 626-644, 649-668, 782-788, 831-843, 853, 856-859, 862(d), 863-864, 869-872, 874, 876, 945-947). This is in direct disobedience to Orders of the Trial Judge dated November 22, 1974, September 19, 1974, September 16, 1974 and September 11, 1974. (See: Order On A&P's Motion For Reconsideration Of Ruling Based On The Solverson Time Standards; For Further Hearings On A&P's Case-In-Chief; And For Hearings ON A&P's Surrebuttal Case, dated November 22, 1974; and Order Denying A&P's Motion for Reconsideration of Ruling Re Solverson Time Standards, dated September 19, 1974.)

In A&P's present proposed findings only the names have been changed; the facts are identical. Now, instead of calling them the "Solverson time standards," A&P is attempting to inject the "Wisconsin time standards" as a part of this record. The facts of record which militate against this brash maneuver are set out in great detail in the above-cited Order of November 22, 1974. Such facts will not be repeated in detail here. For a complete review of the facts and arguments involved, see A&P's written motions of September 3 and November 4, 1974, complaint counsel's responses filed September 12 and November 14, 1974 and the Orders cited above, dated September 19 and November 22, 1974. For the purpose of responding to the present proposed findings complaint counsel will add only a few comments to those arguments.

One of the most important observation in the Order of November 22, 1974 is at the bottom of the first page, where the Judge finds:

> During the presentation of complaint counsel's case-in-chief on June 29, 1973, the testimony of Dr. Solverson concerning certain costs was received. In cross-examination, certain works by Dr. Solverson purporting to contradict his testimony were identified and received in evidence for impeachment purposes (RAPX 8 through 15). (Emphasis added).

The order went on to point out the history of A&P's attempts to inject so-called "Solverson time standards" into this case and why such efforts must be denied. The same logic applies again to A&P's present proposed findings.

A&P is still relying on RAPX 8-15, to sustain its position -- chiefly RAPX 9 and 11. These exhibits are still in evidence for only the limited purpose of impeachment. (See Order, supra). They still have not been shown to have any relevancy, competency or substantiality, insofar as Borden's Chicago area operations are concerned.

A&P attempts to evade this logic by a deliberate misstatement of the testimony of Dr. Solverson. In RAPX 543, on p. 627 of its findings, A&P quotes Dr. Solverson as testifying "that the time requirements for effecting full and limited service deliveries 'in Chicago would be the same as full service in Milwaukee.'" A check of A&P's record citation (Tr. 1556) shows this allegation to be absolutely false. Dr. Solverson never, at any point in his testimony, ventured any opinion as to whether the times used in the Wisconsin manual (RAPX 9), or his thesis (RAPX 11) could be used in any other market.

At the point in his testimony to which A&P cites, Dr. Solverson was testifying concerning the principle that the time requirements as between full service, modified drop service and drop service would become more similar as the volumes increased and that the big time differences occurred in connection with small volume deliveries. (Solverson, Tr. 1554-1556). */ In connection with this principle he stated that he would expect these same relationships to exist in Los Angeles, Chicago or any market. (Solverson, Tr. 1556).

He never, at this point or at any other point in his testimony, said that the "time standards" from the Wisconsin manual or his thesis were applicable anywhere else. (Solverson, Tr. 1543-1649). In fact, the very impeachment purposes for which these documents were allowed in evidence are ample evidence of why they cannot be so applied. A&P introduced the Wisconsin manual and Dr. Solverson's thesis into evidence in order to show disparities between his time study work, as between his thesis and the Wisconsin manual. (Solverson, Tr. 1601-1617). It was revealed in the course of such cross-examination that the thesis contained time observations from one additional company not included in the manual figures. (Solverson, Tr. 1601-1602, 1604-1605). As is pointed out in the cross-examination, this addition of only one company's Wisconsin experiences resulted in a difference in the so-called "time standards" as between the times included in the Wisconsin manual and those used in Dr. Solverson's thesis. (Solverson, Tr. 1604-1615).

---

*/ In other words, that in large volume orders the time requirements for delivery under limited service and full service would not differ greatly. (Solverson, Tr. 1555-1556).

Moreover, the parochial nature of these "standards" is also clearly revealed in such cross-examination. Dr. Solverson revealed that he had trouble meshing the time study of the one additional company with the times included in the Wisconsin manual. He noted that there were differences in the definitions of the various service terms (modified drop and full service) as between this company and those developed in the Wisconsin manual. (Solverson, Tr. 1604-1606). This difference reflected itself, in Dr. Solverson's opinion, in different times as between the thesis and the manual. (Falls, Tr. 1617).

Therefore, these "standards" could not be applied precisely even in the State of Wisconsin. */ Moreover, the manual shows, in and of itself, that there were material differences between Wisconsin and the Chicago market, insofar as service terms were concerned. The Wisconsin manual (RAPX 9) shows that one of the functions performed under "full service" in that State was "stamping merchandise." (RAPX 9, p. 2). This is an obviously time consuming function, since it requires the stamping of each individual item with the retail price in each store. This service was not a part of "full service" in Chicago. (Pergler, Tr. 5651-5654; RAPX 35). Since there

---

*/ Of course, this fact alone is fatal to A&P's position, because we cannot be concerned in this case with the validity of some vague "standard." We are concerned with the time it takes Borden to serve particular classes of customers in the Chicago market area.

have been no specific comparisons on the record of the various services performed under various definitions in the two separate market areas, there can be no telling what other substantial differences might be found if a more detailed comparison could be made.

Furthermore, Mr. Havemeyer's own work shows that you cannot just lift "standards" from one market area and apply them to another market. */ During cross-examination as to certain findings made by him in a study for the State of New Jersey, Mr. Havemeyer had to admit that there were very substantial differences in both the fixed time per stop and the variable time per case, as between his New Jersey study and his Bowman Dairy study. (Havemeyer, Tr. 8183-8187).

Under these circumstances, it is clear that there is just no record basis for expanding the application of RAPX 8-15, from the very limited impeachment purposes for which they were received, into broad, unlimited evidence of service times of Borden's operations in Chicago. Before such expansion of their applicability could be made, there would have to be a complete rehearing of the cost justification study of A&P to determine the competency, relevancy and materiality of the figures in RAPX 9 and 11 to Borden's operations and to

---

*/ Again, as noted above, it is obvious that such "standards" bear no relevancy to the facts in this case in any event, since they do not reveal Borden's serving times.

Mr. Havemeyer's studies. The prior pleadings in this case concerning the "Solverson time standards," as referred to above, and the Orders of September 19 and November 22, 1974, clearly point out why such re-opening of this hearing is neither necessary, nor appropriate.

Accordingly, the proposed findings of A&P referred to in the beginning of this section are in direct contravention of prior rulings and should not be accorded any recognition. Similarly, in a few other places in its proposed findings, A&P has made passing mention of, or citation to, RAPX 9 and 11 as evidence of service times of Borden and Borden's cost experiences. In view of the severely limited purposes for which these documents were admitted, such references are also improper and worthy of no recognition. (It would be virtually impossible in the limited time available, for complaint counsel to cite to each and every one of such references, but wherever they are found they are improper.)

2. Mr. Havemeyer's Qualifications: With the utmost frequency, in the course of A&P's responses to Volume II of our proposed findings, it falls back on the slender thread of Mr. Havemeyer's expertise to "save the day," when there is absolutely no record evidence to support the allocations in question or rebut complaint counsel's criticisms. In this case, that is indeed a very ephemeral support. No matter how

extensive Mr. Havemeyer's experience in the dairy industry may be, it is uncontested that he has absolutely no expertise in Borden's operations and Borden's bookkeeping procedures. Nor, can he be considered an expert in Robinson-Patman cost justification studies. (CF II, Finding 3).

Our proposed findings have noted, and A&P does not dispute the fact that Mr. Havemeyer did not base his studies upon any personal observations of Borden's operations. Further, it was pointed out, and not contested, that Mr. Havemeyer based his study upon a view of only a portion of Borden's records, which portion had been selected by someone else. He did not partake in this selection process and did not review the documentation to determine its completeness or representativeness. He was frequently unable to answer basic questions concerning Borden's operational methods and the manner in which Borden's accounting records were compiled. (CF-II, Finding 5). A&P has not attempted to rebut this evidence, but simply relies on Mr. Havemeyer's general experience within the dairy industry.

Indeed, this is characteristic of A&P's cavalier approach to the question of substantiation at the trial. In general, no attempt was made to substantiate Mr. Havemeyer's assumptions as to Borden's operations and bookkeeping procedures, through calling Borden personnel as witnesses. For a few

limited points, they did re-call Mr. Daube to the stand, and his testimony revealed just how shallow and mistaken Mr. Havemeyer's assumptions could be. [CF-II, Findings 9(c) (ii) n. 20, 9(f)(ii), 9(g)(viii), 15(a)(ix), 15(e)(i), 15(e)(ii), 15(e)(vii), 20(e)(i), 20(e)(ii), 20(e)(v), 20(g)(ii) and (22]. */

Nor can these defects be masked over by arguing that complaint counsel did not present any rebuttal evidence as to such points. Complaint counsel most certainly could not be expected to produce evidence as to points for which A&P had failed to carry its burden of proof. This argument of A&P is the same as that used in connection with the time standards -- that is, "since Mr. Havemeyer says they are relevant they should be allowed in the record and complaint counsel may then rebut them." That argument was appropriately rejected in connection with the "time standards" and is equally as worthless here.

***/ A&P continuously argues that data concerning Borden's operations was not available to them, when the record shows such was not the fact. Borden employees, A&P employees, and officials of competing stores were all still available. The missing data could, for the most part, have been supplied through such witnesses. Yet, no attempt was made by A&P to determine such basic questions as the effect of volume and other criteria on customer classification, Borden and customer experiences dealing with clerical costs, product waste, selling, merchandising, loans, credit, advertising, and the other aspects of Borden's operations and bookkeeping procedures at issue herein.**

COMPLAINT COUNSEL REPLY TO RESPONDENTS' PROPOSED FINDINGS OF FACT

Complaint counsel rely on their proposed findings to illustrate that many assumptions and "guesstimates" of Mr. Havemeyer were at the very least unsubstantiated and, frequently, clearly erroneous. The deficiencies pointed out therein have varying significance insofar as the numbers involved are concerned. However, most are quite substantial in impact, and all-combined they illustrate quite clearly the lack of Mr. Havemeyer's expertise in Borden's operations and bookkeeping procedures, as well as his lack of expertise in the requirements for a Robinson-Patman cost justification study.

The methodology employed by Mr. Havemeyer in his studies may be quite appropriate in establishing industry standards for state agencies, but it does not comply with the strictures of the cost-justification proviso of the Robinson-Patman Act. A reading of Volume II of complaint counsel's proposed findings and the testimony of Mr. Havemeyer, reveals that he has relied heavily in his studies on experiences of other dairy operations (often in other market areas, and without showing any relationship) in determining the costs of Borden's Woodstock operations. Yet other studies, including some conducted by Mr. Havemeyer himself, indicate this cannot be done where you are seeking costs of a specific company rather than broad industry averages (standard costs). */ For instance in RAPX 245A, Mr. Havemeyer's report to the Virginia Milk Commission on a study conducted in that state, it is pointed out as follows:

> The cost of the three principal functions -- plant processing, distribution and in-store handling -- are independent. *That is, a low cost processor could be either a low or high cost distributor; so, also, could a high cost processor.* The costs of each of these functions are independent of those incurred by the customers (stores) to which merchandise is delivered. (RAPX 245A, p. II-4) (Emphasis added).

From this statement it can be seen that there is a great range of possible differences between different dairy operations. A particular dairy may range from a "low cost processor" to a "high cost processor." It can also range from a "low cost distributor" to a "high cost distributor." Moreover, the fact that it is at one end of the range in processing costs, does not mean that it is at the same level insofar as distribution costs are concerned.

Under such circumstances, "standards" may have some meaning in the context of state milk control agencies, but they are most certainly meaningless under the very specific cost justification standards set out in Section 2(a) of the amended Clayton Act.

---

*/ It must be remembered that our inquiry must be directed at what Borden's costs were, not what they should have been ("standard" costs). (See Tr. 7678-7679).

Under these circumstances, Mr. Havemeyer's computations cannot be considered an expert study of Borden's operations, especially when they are admittedly in direct and substantial conflict with internal cost accounting computations made, contemporaneously to the events in question, by Borden's cost expert under very serious and pressing business conditions.

3. Mr. Havemeyer's Studies: Complaint counsel have made a detailed analysis of Mr. Havemeyer's studies in Volume II of our proposed findings. No attempt will be made to repeat that analysis here. A review of those findings and the supporting citations will reveal their continued validity and impact. There are only a few of A&P's positions, in addition to those discussed above, which appear to merit additional comment.

(a) Direct Material Costs - CX 4: A&P attempts to evade the impact of complaint counsel's proposed findings relating to direct material costs (CF II, Finding 9) by falling back on the "expertise" of Mr. Havemeyer. (RAPX, Findings 435-442). However, the record clearly shows that Mr. Havemeyer has no "expertise" with relation to this document. Mr. Havemeyer has insisted that he used CX 4 because it did not include the Ex-Cell-O machine rental cost whereas CX 54 did. Complaint counsel pointed out that Mr. Havemeyer was unable to cite to any evidence to support this conclusion as to either document. A&P in its reply finding (RAPF, Finding 440) takes umbrage at this.

In support of the proposition that CX 4 does not contain such machine rental costs, A&P refers to CX 4F-Q in support. But the fact remains that there is no such thing as a CX 4F-Q. Further, the inclusion in A&P's appendix of a document which is so marked does not alter this point. If in fact Mr. Havemeyer is relying on this document, he is relying on a paper which has not been identified or authenticated on this record. Noone has been called to testify as to just what this document is. No amount of postulation or opinion can change this fact. Moreover, a review of the pages cited (CX 4H-I) of this "non-exhibit" does not reveal clearly and unequivocally that CX 4 did not include machine rentals. */ Testimony explaining this document, from someone knowledgeable of Borden's Wisconsin bookkeeping procedures would be essential to such a determination.

Furthermore, even if machine rentals are not included in CX 4, there is no basis in the record for stating that

---

*/ The document is included in A&P's Proposed Findings as an Appendix to Volume II.

they are in CX 54. The best that Mr. Havemeyer and A&P can come up with in this regard is that "Mr. Malone is likely to have included machine rental costs within the container costs" and that the machine rental costs are included under the category of container expense in Borden's record books. (RAPF, Finding 440; RAPX 67, Account 703-41). However, machine rentals are a separate and distinct sub-account in Borden's records (RAPX 67, Account 703-41-408) and are easily broken out. Borden then refers to CX 23G, prepared by Joseph Malone, to show that in that instance Mr. Malone did include the machine rental cost in with the container costs. (RAPF, Finding 440). However, A&P failed to note one very important fact. The container costs in CX 23G are substantially higher than those in CX 54. (Compare CX 23G and CX 54A). The quart container is almost a penny higher in CX 23G and the half-gallon and gallon containers are .4 cent and .5 cent higher respectively. Obviously, something extra is included in CX 23G. */ That something extra is most likely the machine rental costs.

---

*/ Here the difference could not be due to an interim cost increase (as complaint counsel suggest was the case as between CX 4 and CX 54 [CF-II, Finding 9] since CX 23G is for an earlier time period -- February 1965, as compared to September 1965 for CX 54.

A&P's arguments concerning proof of the content of container cost under CX 4 and CX 54 are, therefore, just not substantiated.

As a final non-sequitur, A&P concludes this argument with the astounding observation that it makes no difference whose view is accepted on this point, since Mr. Havemeyer has included rental costs under processing anyway, and thus it has not been lost. (RAPF, Finding 441). This is just amazing! The fact is crystal clear that Mr. Havemeyer's calculations have excluded costs. If CX 4 and CX 54 neither contain machine rental cost, then the difference between container costs in CX 4 and those in CX 54 reflect only differences in the basic cost of containers as between these different plants and different years. The inclusion of an entirely separate cost, machine rentals, in an entirely different allocation cannot remedy this deficiency. Moreover, no measure of general dairy industry expertise on the part of Mr. Havemeyer can substitute for evidence as to what these documents actually show.

(b) Production Expenses: In this section, as in the case of all other allocations where complaint counsel have noted the defective analysis of Borden's accounts by Mr. Havemeyer, A&P simply ignores the question of such deficient analysis. There is not one single word in defense of

Mr. Havemeyer's failure to look at more than one month's accounts, or his failure to determine whether other expenses were incurred which should have been allocated thereto, or the fact that he made no attempt to determine whether the debits and credits in such accounts were typical, representative and complete. (See CF-II, Finding 9(b) and RAPF, Findings 443-477). In the main, A&P relies upon a meaningless comparison between CX 54 and CX 87A to support its position that CX 54 was inaccurate and Mr. Havemeyer's calculations are correct. (RAPF, Findings 449-459). In CX 87, Mr. Malone computed the per point, average production expense for all products produced and sold to A&P during the week of May 28, 1966. In CX 54, Mr. Malone computed the productions cost for each of the private label items and glass gallons for some time prior to September 1, 1965. (Compare CX 87A and CX 54B). There is just no way, on the basis of this record, that any meaningful comparison can be made of these figures. They are computed on an entirely separate basis, for entirely separate time periods. It is interesting to note, however, that in both instances the over-all calculations reveal A&P was receiving a below cost price.

Insofar as processing costs are concerned, therefore, A&P has utterly failed to come to grips with the objections to RAPX 232 contained in complaint counsel's Proposed Finding 9(b).

(c) Other Allocations: In each and every instance A&P has simply ignored complaint counsel's objections pertaining to the inadequacies and deficiencies involved in Mr. Havemeyer's examination of Borden's records and the selection of the allocable expenses. Most certainly, Mr. Havemeyer's "expertise" cannot gloss over such failures. He has not even complied with his own accounting principles laid down in his instructions to the Wisconsin dairies, which require an examination of records over a period of sufficient length to cover cyclical and seasonal fluctuations. (See CF-II, pp. 24-25, for example).

Similarly, the other errors cited and documented by complaint counsel cannot be swept under the carpet by a simple reference to "expertise." "Expertise" cannot overcome the clear and uniform evidence of record showing that the deliverymen's commissions are not related to the hours worked by a deliveryman, but rather to the volume he delivers. (CF-II, pp. 56, 116 and 188). Nor can "expertise" overcome the glaring omission's in Mr. Havemeyer's knowledge and experience relating to such matters as: his position on the treatment of product waste (CF-II, pp. 82-84, 136-140, 198-204); his selection of records and expenses dealing with Valparaiso (CF-II, pp. 243-248); and numerous other facts basic to his allocations. [For example, see CF-II, Findings 9(1), 15(n) and 27).

Moreover, Mr. Havemeyer cannot through "expertise" twist the facts of record so that they conflict with the record and simple logic. Thus, he cannot make bad credit risks of customers who stay within the normal 30 day credit period. (CF-II, pp. 226-227). Nor can he charge a class of customers with Borden's expense of carrying bad loans, when such customers have not received any loans from Borden. (CF-II, pp. 209-212).

The bare assertion of "expertise" is simply another effort on the part of A&P to push onto complaint counsel the burden of proving or disproving A&P's own cost study. It tried the same tactic with the "time standards" and the "Ex-Cell-O" standards. But the fact remains that RAPX 232-234 are A&P's exhibits, not complaint counsel's. It is A&P's burden to come forward with reliable, probative and substantial evidence to substantiate such cost studies. As demonstrated in our proposed findings, it cannot do so.

(d) Valparaiso: A perfect example of the efficacy and effect of Mr. Havemeyer's "expertise" is his Valparaiso allocations. There he selects a Borden accounting record dealing with sales to independent distributors (not stores), without showing that it bears any relationship to Valparaiso nor, if it should perchance include the Valparaiso sales, that any of the expenses therein are attributable to the A&P store or Tittle store in question (since these stores were not even the customers of the vendor who served them). (CF-II, pp. 243-248). Obviously, such a basic lack in evidentiary substantiation cannot be glossed over by some magic, with the word "expertise."

Indeed, A&P actually admits the failure of Mr. Havemeyer to justify the Valparaiso discriminations, but argues that a single showing of price discrimination could not sustain a price discrimination charge under the Robinson-Patman Act. (RAPF, p. 918). In other words A&P is saying, "You wouldn't get us for just one price discrimination, would you?" But this is all Section 2 of the amended Clayton Act requires. It speaks of a violation where "either or any" of the purchases involved are in commerce. [Section 2(a), amended Clayton Act].

Nor is this an insignificant discrimination, amounting to over $14,000 in just 16 months against a major independent store, which purchased at least three time the volume from Borden as did the competing A&P store. (CF, p. 84 and Appendix II-1). Moreover, the record evidence, as reviewed above, reveals that A&P knew or should have known that the private label contract was unlawfully discriminatory. */

---

*/ Of course, as noted elsewhere in this response and in our original proposed findings, we have proven unlawful discriminations existed against a number of other substantial competitors of A&P also.

(e) RAPX 244: A&P also relies on Mr. Havemeyer's work in RAPX 244 to support his position that the "media advertising" expenses used in the Hammond cost study were applicable to the entire line of Borden products, and not to just the few new products covered by the advertising. (RAPF, p. 897). Again Mr. Havemeyer's "expertise" is highly questionable. His examination on the preparation of RAPX 244 reveals a very basic lack of knowledge as to the Borden records, sales, product identities, and the nature of the advertising which underlie his calculations. (Havemeyer, Tr. 9645-9656). Just the fact that these were all apparently new products which had just recently been introduced (Havemeyer, Tr. 9646, 9650, 9654) would render the sales data contained in RAPX 244 meaningless insofar as future sales projections are concerned. Thus, A&P's projections as to the potential for recoupment of advertising expenses from these products are worthless. Furthermore, this document was received in evidence despite the Judge's observation that "There are some serious questions on the probative value of the document . . ." (Tr. 9656). A&P has not introduced any further evidence concerning the basic deficiencies therein, i.e., the particular sales and proper prices involved, the amount of sales and when they began, product identification, and the nature of the advertising. (Havemeyer, Tr. 9645-9656). In view of Mr. Havemeyer's admission that companies do engage in advertising directed at only one product out of an entire line, complaint counsel's proposed findings in this regard are undisturbed. (CF-II, pp. 229-231).

(f) Borden's Reduction In Routes On The O'Hare Branch Is Not Evidence Of Cost Justification:

A&P at several points in its findings alleges a reduction in the number of routes in the O'Hare Branch from 20 to 13 as the result of the private label program and urges that this is support for its cost justification arguments. (For example, see RAPF, pp. 558-642). This argument again fails to bear up under analysis.

There is no testimony on this record stating that Borden was able to reduce the number of its routes as the result of the limited service provisions in its contract with A&P. The evidence does reveal that Borden was engaged in a continuous process of route reduction since at least 1963. (Pergler, Tr. 5639; RAPX 40). This was a gradual and continuing reduction. (See RAPX 76).

There is also testimony of Mr. Pergler to the effect that Borden had been able to reduce the number of routes from 20 to 13 after the inception of the private label contract with A&P, but he does not give the limited service provision credit for this reduction, nor does he indicate this was an instantaneous process. (Pergler, Tr. 5639-5640). Instead, he noted:

> Now prior to the private label program our men served the A&P stores according to the demands of the individual [A&P] store managers, the result being that our man was probably driving over his entire territory a number of times. Once we got into the private label program with A&P, we had a more orderly method of serving the routes by laying them out in such a way that was most advantageous to us.
>
> Instead of jumping around to try to satisfy every individual [A&P] manager as to the time of delivery, we started at a given point and went right through to an ending given point, thereby saving a lot of time. (Pergler, Tr. 5639-5640). (Emphasis added).

Thus any reduction in routes was not due to any differences in service as between A&P and its competitors. A&P's own witness, Mr. Pergler, on direct examination, ascribed this reduction to the elimination of an extra, special service which Borden had been providing to its biggest, most important customer; in obvious discrimination against its other retail store customers on its O'Hare routes. That is, it was no longer "jumping around" on its routes and thus "driving over [the] entire territory a number of times" for the benefit of the A&P store managers. (Pergler, Tr. 5640). */

---

*/ Moreover, Mr. Pergler's testimony does not reveal how much of a part the already ongoing reorganization of Borden's routes had to play in this reduction. (See RAPX 76).

In further support of Mr. Pergler's testimony in this regard, it is noted that the route reduction was not an instantaneous accomplishment, as it would have been had the reduction revolved around a reduction in in-store services. Mr. Pergler did not say how long such reduction took, only noting that he "finally" reduced the routes to 13. (Pergler Tr. 5639). RAPX 76, p. 1, on the other hand noted that there were still 19 routes in March of 1966. These facts, coupled with Mr. Pergler's uncontradicted testimony, reveal that the so-called "limited service" provisions of the Borden-A&P contract were not the cause of the O'Hare route reductions.

Finally, the evidence of record does not reveal any reductions in routes in any other Borden branch which can be related to the Borden-A&P contract. This again supports the evidence of record, introduced by A&P, showing that Borden's route reductions in its O'Hare Branch did not result from the "limited service" provisions of the private label contract. Therefore, the route reduction argument fails to support A&P's positions regarding substantial differences in service and cost justification.

(g) Misleading Citations to Wixon and Mr. Lemberg In Connection With Overhead Expenses:

Mr. Havemeyer applied the overhead (central office) costs, on a percentage factor basis, to only those branch functions included in his O'Hare and Hammond studies.

(CF-II, pp. 157-158, 239 and 262). Complaint counsel contested this methodology on a number of bases, including the fact that the overhead costs were related to more than just these few branch functions and that they should be allocated to the segments of Borden's business to which they related, with any residual being allocated to all of the business activities of the home office.

A&P takes issue with complaint counsel's position and cites in support of Mr. Havemeyer to Wixon, Accountant's Handbook, 4th Ed., Fig. 11, p. 9.26, and to the testimony of Mr. Lemberg at p. 9500 of the transcript. (RAPF, p. 772).

The citation to Wixon is unsupportive at the very least and the citation to Mr. Lemberg's testimony is simply a misstatement of the record.

Figure 11 at p. 9.26 of the Wixon book is simply a suggested form of statement for comparing one year to another as to certain expenses (not limited to overhead expenses). Nothing therein has the slightest bearing on the allocation procedure to be followed in allocating general selling and administrative expenses.

The citation to Mr. Lemberg is just not so. He is credited with stating unqualifiedly that the exact procedure followed by Mr. Havemeyer "is an almost universally followed practice." (RAPF, p. 772). He did not so state. What Mr. Lemberg did say was that the allocation of central office, overhead expenses on the basis of a percentage of costs previously allocated "is the usual way to do it but I have to qualify that again only those that cannot be directly charged -- if you had some that must be directly charged then they have to be removed." (Lemberg, Tr. 9500). (Emphasis added).

Mr. Lemberg's testimony does not conflict, and obviously agrees, with the authority to which complaint counsel referred from the Federal Register, which requires the allocation of home office expense to segments of the business to which they are related and the allocation of any residual to all of the business functions to which they apply. (CF-II, pp. 158-159), 239-240, 296-297).

With regard to such authority it is interesting to note that A&P would urge that the Federal Register citation is inapposite since it refers to accounting principles which must be followed by defense contractors. (RAPF, pp. 772-773). This only makes these criteria, which have been laid down by the "Cost Accounting Standards Board," all the more impressive. It is expected that these standards, which apply to such an important segment of our business world, would be grounded on generally accepted accounting principles, and represent an adaptation of those accepted principles to defense contracts. Moreover, the procedures recommended herein represent only simple logic. It is certainly deceptive and unprofessional to allocate costs to a particular customer, through a particular function, if the cost bears no relationship to that customer or that function.

(h) A&P's Response to Questions Concerning Classification of Customers, Averaging of A&P's Costs, Etc.

A&P's response to the defects in Mr. Havemeyer's work concerning classification of customers, averaging of A&P's costs, failure to consider countervailing costs, failure to allocate costs in the manner incurred, failure to properly allocate overhead costs, and inapplicability of the studies to the periods of discriminations, as well as the unavailability of the cost justification defense under the facts of this case, has been to side-step the gravamen of such arguments or ignore them completely. Thus, the sum and substance of complaint counsel's arguments at pages 286 through 305 of Volume II of our proposed findings are virtually untouched by A&P's response.

(i) Classification of Customers: A&P here simply ignores each and every fact related in our findings which illustrates Mr. Havemeyer's failure to properly classify customers. (RAPF, pp. 320-325). Indeed, there is simply no way A&P can explain away the deficiencies noted at pages 287-290 of Volume II of our findings, and in the underlying findings cited therein. It therefore engages in a meaningless rehash of the Borden case and attempts to show how Mr. Havemeyer complied with its strictures. Unfortunately for A&P, the facts of record will not support its position. The limits in this case were not on A&P's ability to obtain data for a more specific classification of customers (RAPF, p. 324), but upon Mr. Havemeyer's unwillingness to face up to the overwhelming evidence of record revealing that there were various classes of retail grocery customers involved in this matter, even among the A&P stores themselves. (CF-II, pp. 287-290).

(ii) The Averaging of Costs For A&P Stores: Similarly, A&P simply side-steps the issue of averaging A&P's costs in Mr. Havemeyer's cost justification studies (RAPF, pp. 326-332A), instead of answering the specific objections raised by complaint counsel in Volume II of their proposed findings (pp. 290-293). First, A&P twists this discussion around to one of price, not costs, and argues that in any event an average price would have to be arrived at in dealing with a chain. Then, it argues that the Borden case allows averaging of costs. Both positions completely miss the mark.

We are not concerned with the question of price at this point, but rather the question of cost. It is conceded that A&P will pay only one lump sum for its Unit milk purchases, whether the price quoted is an average one for all, or is varied for each store. That is not the problem here.

At the other end of the proposition, when we determine whether a price discrimination is cost justified, the same logic does not apply. If we ignore the different classes of customers within a chain, we are ignoring entirely different cost characteristics which can materially affect the results in a cost justification study. This is so because the high-service-cost characteristics of the small-volume, old-fashioned stores are being masked over by combination with the high-volume, larger, more modern stores. A particular competitor may be vying against a small, run-down A&P store with a high service cost, but the cost study will show it competing against a much larger, more modern supermarket. This is the logic of National Dairy Products Corporation, 70 F.T.C. 79, 193-196, 207 (1966). (See CF-II, pp. 290-293).

Nor, is this logic affected by the fact that the Commission accepted the averaging for the six corporate chains in National Dairy, but not for two voluntary groups. (RAPF, p. 232). The facts in that case reveal that only the two voluntary groups had small volume stores. This is why averaging of costs was improper for them, not because they were not chains. If all of the stores of such voluntary groups had belonged in the same class, averaging would have been legitimate. It is important to note that the Commission's language at pages 194-195 of the National Dairy case, supra, is related to chains, not voluntary groups as such.

Moreover, this also is the obvious response to A&P's arguments at pages 330-331 of its Findings, where it discusses the *Borden* decision and the fact that averaging is permissible for *classes of customers*. With this, complaint counsel heartily agree. We do not argue anywhere in our findings that A&P stores, or the competing stores, should be each individually costed out. A&P is attempting to evade our entire point. The record clearly shows that A&P stores fell into more than one class of customer (CF-II, pages 287-293 and underlying findings cited to therein). Therefore, under the principles laid down in *National Dairy*, as well as the *Borden* case, A&P stores must be properly classified and the different *classes* of A&P stores must be separately analyzed. Otherwise, a true cost comparison between A&P and its competitors cannot be made. */

(iii) *Failure to Consider Countervailing Costs*: Here A&P has simply ignored completely the specific factual allegations upon which complaint counsel rely. We therefore refer to our argument on pages 294 and 295 of our findings and to

---

*/ A&P's argument based upon the *Sylvania* case (RAPF, pp. 332-332A) is just not relevant. There the question was whether it was proper to aggregate costs on an entire line of products, not costs as between different stores. The study was accepted for reasons entirely unrelated to any issues in this case.

the findings cited therein, as proof of Mr. Havemeyer's failures in this regard. */

(iv) Failure to Allocate Costs in the Manner Incurred: A&P has never disagreed with this principle (See footnote 150 on page 295 of CF-II) and it does not raise any argument thereto in its present findings. In effect, it argues throughout its findings that Mr. Havemeyer has allocated each cost in the manner incurred. The argument at pages 295 through 296 of CF-II, with the citations to the underlying findings, belies this position.

(v) Failure to Properly Allocate Overhead Expenses: As noted above in subsection (g), A&P's citations to Wixon and Mr. Lemberg's testimony will not support Mr. Havemeyer's method of allocating overhead costs. Furthermore, A&P has not rebutted the facts set forth in Findings 15(h), 20(j) and 24(d) of Volume II of Complaint Counsel's Proposed Findings.

(vi) Inapplicability to the Periods of the Discrimination: Nowhere in A&P's findings and argument has it taken on the principle announced in the Utah Pie case, 386 U.S.

---

*/ A&P does, in various parts of its findings refer to this argument in connection with various allocations, but generally dismisses it out-of-hand as having no merit. Unfortunately for A&P, simple logic and Mr. Rowe disagree. See CF-II, pp. 294-295.

685, 695, n. 10 (1967) which shows that Mr. Havemeyer's studies are so limited in time and scope that they are simply not applicable to the entire periods of discrimination proven in this case. (See pages 300-305 of CF-II). Complaint counsel have studiously illustrated the facts of record which command this result. Yet, A&P has not said one word which would detract from this position.

(vii) Unavailability of the Cost Justification Defense Under Facts of This Case: Lastly, A&P attempts to shrug off complaint counsel's arguments concerning the availability of a cost justification defense based on the service terms of the Borden-A&P agreement. (RAPF, pp. 922-923). It argues that complaint counsel's position (stated at pages 297-300 of CF-II and in underlying findings) amounts to a reading of the "proportionally equal" requirement of Sections 2(d) and (e) into the cost justification proviso of Section 2(a). This simply is not so.

It is obvious under Section 2(a) of the Act that the differences in service upon which a cost justification study is based must not be completely artificial. Such differences must be inherent in the nature of the dealings as between the different customers. If this is not so, then Section 2(a) is meaningless, since it can easily be evaded by arbitrarily offering different service terms to different customers. Indeed, the Orders under which Borden and Bowman were operating in this area, as the result of the proceeding underlying U.S. v. Borden, 370 U.S. 460 (1962), recognizes this fact by requiring that optional methods of delivery be made available to all customers. (RAPX 51). This is significant support for complaint counsel's position in pages 297-300 and in Findings 15(b)(ii), 15(q) and 20(b)(vi) of Volume II of our findings.

A&P has simply failed to meet the gravamen of complaint counsel's findings in this regard. It is quite clear, that at the very best, no more than a 2% differential could be justified on the basis of service, since this is the full extent of the discount afforded to competitors based on the identical limited service. (CX 123 and 138; See CF 87-C and 103-C). However, complaint counsel urge that even this much justification should not be allowed, since the limited service program of Borden was not, in realistic terms, made available to A&P's competitors. (See CF-II, Findings 15(b)(ii), 15(q) and 20(b)(vi) and argument on pages 297-300 for a full discussion of this point).

(j) *Conclusion*:

The objections to Mr. Havemeyer's studies, as noted in our proposed findings and in this reply, are so basic and so serious that the various citations of A&P to authorities such as *Minneapolis-Honeywell*, *Standard Motor Products*, Rowe, the Report to the FTC of its Advisory Committee on Cost Justification */, and others at pages 311-319 of its findings, are meaningless. None of these authorities endorse the acceptance of a cost justification study as defective as the present one.

---

*/ The Report of this Advisory Committee was never adopted by the Commission, but this is irrelevant under the extreme conditions here. The recommendations therein could not lend any credence to the studies in this case.

FILED: September 24, 1975

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

INITIAL DECISION

DOCKET NO. 8866

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation
and
BORDEN, INC.,
a corporation.

SEPTEMBER 24, 1975

HARRY R. HINKES
ADMINISTRATIVE LAW JUDGE

INITIAL DECISION

TABLE OF CONTENTS

Page

Preliminary Statement ---------------------- 1

Findings of Fact ---------------------- 3

A. A&P's Identity and Business Nature --------- 3
B. Borden's Identity and Business Nature ------- 6
C. Commerce ---------------------- 7
D. Negotiations ---------------------- 9
E. Grade and Quality ---------------------- 19
F. Contemporaneous Sale ---------------------- 19
G. Discrimination ---------------------- 20

I. Gary-Hammond and Valparaiso Areas -------- 20
II. The Chicago and Suburbs Area -------- 23

H. Injury to Competition ---------------------- 25
I. A&P's Inducement or Receipt of Borden's Private Label Pricing ---------------------- 27
J. A&P's Knowledge that Borden's Bid was Not Cost Justified ---------------------- 27
K. The Bowman and Borden Competitive Bids ------ 31
L. Cost Justification ---------------------- 33

A&P's Factual and Legal Contentions ------------- 34

A. Count I ---------------------- 34
B. Count II ---------------------- 38

I. The Discrimination ---------------------- 38
II. The Representativeness of the Stores ----- 39
III. Knowledge ---------------------- 42
IV. Meeting Competition ---------------------- 44
V. Cost Justification ---------------------- 45
a. Attacks upon Malone's calculations ---- 45
b. Burden of Proof ---------------------- 47
c. Havemeyer's Cost Studies ------------- 49
i. Delivery Costs ------------- 50
ii. Processing Costs ------------- 53
iii. Havemeyer's Unfamiliarity --------- 54
iv. Indiana Irregularities ------------- 56
v. Branch Selling Expense ------------- 57
vi. Failure of Classification ---------- 58
vii. Countervailing Costs ------------- 60
viii. General Selling and Administrative Costs ---------------------- 61
ix. Credit Loss ---------------------- 62
x. Advertising Expense ------------- 63
xi. The Availability Argument --------- 63
xii. Conclusion ---------------------- 65

Page

- VI. The Borden Defense ---------------------- 65
- VII. Commerce and By-Products ---------------- 66

C. Count III ---------------------------------- 67

- I. Complaint Counsel's Contentions ---------- 70
- II. Respondents' Reply ---------------------- 72
- III. Conclusion ---------------------------- 75

D. The Denial of Due Process ---------------- 78

- I. A&P's Contentions ---------------------- 78
  - a. The Unavailability of Documents ------- 79
  - b. The Unavailability of Witnesses ------- 81

Conclusions of Law ---------------------------- 85

The Remedy ---------------------------------- 86

Order -- 89

Appendix

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

INITIAL DECISION

Harry R. Hinkes, Administrative Law Judge

John J. Mathias, Edwin R. Soeffing and Andrew G. Stone, Esquires,
Counsel Supporting the Complaint

Cahill Gordon & Reindel
Attorneys for Respondent, The Great Atlantic & Pacific
Tea Company, Inc., New York, New York
Denis McInerney, Raymond L. Falls, Jr., Thomas F. Curnin,
Joseph P. Foley and Ira J. Dembrow, Esquires, Of Counsel.

H. Blair White, Theodore N. Miller and Nathan P. Eimer, Esquires,
Attorneys for Respondent, Borden, Inc., Chicago, Illinois,
Sidley & Austin, Chicago, Illinois and
Walter W. Kocher, Esquire, Columbus, Ohio, Of Counsel.

PRELIMINARY STATEMENT

This proceeding began with the issuance of a complaint by the Federal Trade Commission on October 8, 1971, against The Great Atlantic & Pacific Tea Company, Inc., (hereafter A&P) and Borden, Inc., (hereafter Borden). The complaint contains three counts. Count I of the complaint charges that A&P violated Section 5 of the Federal Trade Commission Act as well as the policy of Section 2 of the Clayton Act as amended, in the manner and method by which it negotiated its price on private label milk. 1/ The complaint charges that when Borden tendered its final offer to A&P it informed A&P that the offer was being granted for the purpose of meeting competition but that A&P accepted the offer with knowledge that Borden had granted a substantially lower price than that offered by the only other bidder and without notifying Borden of this fact.

Count II of the complaint charges A&P with a violation of Subsection (f) of Section 2 of the Clayton Act as amended by knowingly inducing or receiving discriminations in price which are prohibited by Subsection (a) of Section 2 of the Clayton Act as amended, from its supplier Borden.

Count III of the complaint charges both Borden and A&P with a violation of Section 5 of the Federal Trade Commission Act by a course of conduct constituting a combination between them which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products.

All of the violations alleged in the complaint center about the private label supply agreement entered into between respondents A&P and Borden under which Borden began private label sales to A&P's Chicago Unit's stores on or about November 1, 1965. Such sales continued under the agreement until February 1972. The agreement covered sales of milk and dairy products to more than 200 A&P stores located in a multistate area including portions of Illinois and Indiana.

The illegal conduct described in Count I is alleged to have occurred during A&P's course of dealings with Borden leading up to the agreement, which dealings took place from late 1964 up until November 1, 1965. The illegal conduct described in Count II is alleged to have occurred during the same period and also during a later time period when the agreement was in force. In connection with the illegal combination alleged in Count III, complaint counsel limited their main period of proof to include November 1, 1964 through December 31, 1968.

1/ Prehearing conference of May 15, 1973 (Tr. p. 5).

After a number of prehearing conferences, hearings commenced on June 11, 1973 and continued with short interruptions until March 27, 1975 when the record was closed for further evidence.

Not only is this case one of great complexity but its dimensions as well are extraordinary. In addition to the more than 110 hearing days expended, the scores of witnesses heard, the stipulations received, the hundreds of exhibits aggregating about 10,000 pages received, and the more than 11,000 transcript pages of testimony and argument, counsel for the parties have submitted for my consideration briefs totaling more than 2,000 pages which, considering the limited time given for such endeavor, are most commendable.

Any motions not heretofore or herein specifically ruled upon, either directly or by necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusions and briefs as submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parenthesis using the following abbreviations:

CX - Commission's Exhibit; RAPX - A&P's Exhibit; Ans. - Answer; Tr. - Transcript of the Testimony; DTR - Malone Deposition Transcript, CX 262; Comp. - Complaint; Adm. - Admission.

Having reviewed the record in this proceeding and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

A. A&P's Identity and Business Nature

1. Respondent A&P is a corporation organized, existing and doing business under and by virtue of the laws of the

the State of Maryland, with its principal office and place of business located at 420 Lexington Avenue, New York, New York (Comp. Par. 1; Ans. Par. 1).

2. Respondent A&P is now and for many years has been engaged in the operation of a large chain of grocery stores. During the middle 1960's A&P ranked first nationally in terms of sales among retail grocery chains (CX 218G; Smith, Tr. 1340). It operates approximately 4,329 stores in 36 states of the United States, the District of Columbia and Canada. It also operates a number of plants for the manufacture and processing of food and other products handled in its stores including plants which process and manufacture milk and other dairy products. Its annual sales for the fiscal year ending February 22, 1969 totaled over 5.4 billion dollars and, for the fiscal year ending February 1970, totaled over 5.7 billion dollars (Comp. Par. 2; Ans. Par. 1). A&P stores carry a full range of grocery and related products, many of which are purchased by A&P from other national sellers of goods and are shipped to A&P across state boundaries (CX 218E, F; Smith, Tr. 1387-1388; Schmidt, Tr. 1677-1678). A&P also manufactures and sells many private label products in its stores and did so even before 1965 (Smith, Tr. 1380-1381). It was A&P policy to promote private label products where feasible because their sale usually resulted in larger gross profit, greater attraction of the public to A&P stores and more flexibility for A&P in its dealing with suppliers (Corbus, Tr. 7325).

3. At the time of the private label agreement which is involved in this case, A&P's Chicago Unit encompassed the States of Iowa, Indiana and Illinois (including the Chicago metropolitan area). It operated approximately 260 stores. In 1969, the Unit became a Division which was comprised of 236 stores (Comp. Par. 2; Ans. Par. 1; Schmidt, Tr. 1675; Bartels, Tr. 1853-1854).

4. Products sold through A&P's Chicago Unit stores were procured under the supervision and control of the Head Buyer located in Chicago who, for most of the 1964-1969 period, was Mr. Elmer Schmidt (Schmidt). He was also personally responsible for the Unit's purchases of dairy products

except for cheese (Schmidt, Tr. 1667-1669). During the middle 1960's Borden was the principal supplier of dairy products to A&P's Chicago Unit and supplied about 95 percent of that Unit's requirements (Schmidt, Tr. 1678). Sales of dairy products by Borden to A&P's Chicago Unit amounted to millions of dollars annually with purchases of eleven of the most important items amounting yearly to somewhere between 5 and 6 million dollars (CX 263B; Schmidt, Tr. 1679).

5. It was A&P's Chicago Unit which was involved in the private label agreement with Borden here at issue. And although A&P Headquarters in New York gave final approval to that private label agreement, and reviewed the reliability of the supplier chosen (Smith, Tr. 1347), the private label negotiations themselves were handled primarily at the Unit level (Smith, Tr. 1355-1356; Archer, Tr. 1232-1233). Indeed, it was A&P's Unit Buyer, Schmidt, who was the principal company official involved for A&P in the Chicago private label negotiations (Bartels, Tr. 1865). Schmidt undertook these negotiations as part of a planned move toward private label originating at A&P's New York Headquarters (Bartels, Tr. 1862-1863; Smith, Tr. 1351-1352).

6. The A&P Chicago Unit was one of four Units comprising the A&P Middle Western Division which included among other areas Milwaukee, Wisconsin (Smith, Tr. 1344; Bartels, Tr. 1857). Mr. Ira Bartels (Bartels) was A&P's Director of Purchases for the Middle Western Division from 1964 until 1969 and supervised the activities of Schmidt (Bartels, Tr. 1853-1854, 1858; Schmidt, Tr. 1673-1674).

7. During the middle 1960's A&P was composed of between five and seven divisions consisting in all of 32 Units. In charge of purchases of each Unit was the Unit Buyer such as Schmidt of the Chicago Unit. The Unit Buyer reported directly to the Divisional Purchasing Director, such as Bartels of the Middle Western Division, who in turn reported to the Division President and to the National Purchasing Director located in New York City Headquarters. Similarly, the Unit Sales Manager reported directly to the Divisional Sales Director who in turn reported to the Division President and to the National Director of Sales located in the New York City Headquarters (Smith, Tr. 1336-1337; CX 258). In 1969 the Unit-Division setup was abolished and A&P created 32 Operating Divisions so that the Chicago Unit became a Division. Bartels was designated Purchasing Manager when the Chicago Unit became a Chicago Division and Schmidt was designated as Buyer and

later as Administrative Assistant (Bartels, Tr. 1853-1854; Schmidt, Tr. 1663-1664). When Bartels left the employment of A&P in 1970, Mr. Edmund Bayma (Bayma) became Purchasing Director of the Chicago Division (Bayma, Tr. 5918).

B. Borden's Identity and Business Nature

8. Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York (Comp. Par. 4; Ans. Par. 15-4).

9. Respondent Borden does business throughout the United States and in Canada (Minkler, Tr. 88; Archer, Tr. 1203). As of December 31, 1969 Borden held a 100 percent voting power in about 22 subsidiary corporations and possessed about 200 plants that were managed by four Operating Divisions (Comp. Par. 5; Ans. Par. 15-5). Its Dairy and Services Division conducts a dairy business in which the chief trade name is Borden. Borden's net sales in 1969 as well as in 1970 amounted to over 1.8 billion dollars (Comp. Par. 5; Ans. Par. 15-5).

10. In the course of its business Borden owns, maintains and operates receiving stations, processing and manufacturing plants and distribution depots located in various states from which it sells and distributes its products. Borden sells its milk and other dairy products to various purchasers including retailers. Most of its retailer-customers resell to consumers and certain of its retailer-customers are in competition with other of its retailer-customers (Comp. Par. 8; Ans. Par. 15-8). A&P, whom Borden served in the Chicago and Northwest Indiana area during all of the time involved in this case, is now and has been in active competition with certain other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products including milk and certain other dairy products (Comp. Par. 3; Ans. Par. 15-3; A&P's Adm. dated March 12, 1973, p. 4, 5; Gintert, Tr. 2442; Barney, Tr. 3688).

11. From the early 1960's through the end of 1966 Borden managed certain of its dairy operations through its Chicago Central District or Division which included Chicago, Illinois, the northern part of Illinois, part of Iowa, part of Minnesota, most of Wisconsin, part of Michigan and the

northwestern corner of Indiana (Minkler, Tr. 88). The Chicago Central District Management Group consisted in part of Mr. Ralph Minkler, President (Minkler); Mr. Joseph Malone (Malone), Vice President, Regulatory Controls (and formerly Comptroller); Mr. Gordon Tarr (Tarr), Sales Manager for Chain Stores; and Mr. Orville Gose (Gose), Regional General Manager (Minkler, Tr. 88, 111-113; Tarr, Tr. 843; Gose, Tr. 1037). After 1966, Borden's Chicago Central District was merged into its Midwest District in Columbus, Ohio. Minkler retired in December 1966 but Malone, Tarr and Gose remained (Minkler, Tr. 87, 279, 331; CX 262 Malone, DTR. 6, 7; Tarr, Tr. 842; Gose, Tr. 1067).

12. Minkler reported to the President of Borden's Milk and Ice Cream Division in Borden's New York Headquarters. That post was first filled by Mr. Harry Archer (Archer) who was succeeded in the middle 1960's by Mr. Pentz (Minkler, Tr. 98, 126; Archer, Tr. 1203-1205, 1207-1208; CX 292 p. 2). After Chicago Central District's merger into the Midwest Division, Borden's Chicago personnel reported to Mr. Patterson, President of Borden's Midwest District in Columbus, Ohio, who in turn reported to Borden's New York City Headquarters (Gose, Tr. 1059).

C. Commerce

13. A&P admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act and amended Clayton Act (Ans. Par. 2; Adm. dated September 27, 1972, p. 7, Sec. III, 1-2). A&P also admits transporting across state lines goods which it had produced or processed in one state for sale through its stores in other states. Its Chicago Unit included stores in the states of Illinois, Indiana and Iowa (Schmidt, Tr. 1665,1674) and advertised in newspapers distributed in both Illinois and Indiana.

14. Borden also admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act (Adm. filed March 19, 1973, p. 11 Sec. III-3). It also admits that it regularly transported raw milk from one state to another and that its plants received in excess of 10 percent of their raw milk supply from dairy farms in states other than those in which the plants are located (Adm. filed May 5, 1972, p. 4, 5). Borden advertises nationally (CX 212M; CX 214E). Its Woodstock, Illinois, plant obtains much of its raw milk from Wisconsin (Minkler, Tr. 104). After processing, the milk

and dairy products are shipped outside the state and outside the Federal Milk Marketing Order areas. The same Woodstock, Illinois, plant produced substantially all of the private label products sold to A&P under the private label agreement involved here, a great many of which products were then distributed to A&P stores in Indiana (CX 62; CX 263; Adm. filed May 5, 1972, p. 5). In addition to the Woodstock, Illinois, plant, Borden's Chicago Central District operated milk plants in Indiana, Iowa and Wisconsin (Minkler, Tr. 88).

15. A&P, pursuant to the private label agreement, purchased milk and dairy products from Borden for its grocery stores both within and without the state of Illinois (CX 62; CX 182; CX 187; CX 263). Borden, to fulfill the private label agreement, obtained part of its milk from out-of-state and processed certain milk and dairy products in its plant at Woodstock, Illinois (Adm. filed May 5, 1972, pp. 4-5). Borden then shipped said products across state lines to be delivered to A&P's out-of-state stores.

16. Woodstock, which opened in 1964 and was in full production by 1965 or early 1966, received its raw milk from the Chicago Milk Shed which extends through Wisconsin, Illinois and Indiana (Minkler, Tr. 104-105, 110; Adm. filed September 29, 1972, p. 8, Par. III-5; CX 211B, D, G; Minkler, Tr. 99-100).

17. Borden's practice in connection with its Woodstock operations was to purchase raw milk as needed for the expected demands of its customers, process it and deliver it to its customers as quickly as possible. Milk was not stored at Borden's Woodstock plant more than approximately 24 hours during this process (Borden Adm. dated March 15, 1973, III-28; Minkler, Tr. 108-109). At the processing plant milk was inspected, cooled, standardized and in some cases fortified, pasteurized and homogenized (Minkler, Tr. 107-109; Tise, Tr. 5834-5837). Processing of the major fluid milk items - milks and creams which accounted for over 70 percent of Borden's sales (RAPX 75) - is a nearly instantaneous mechanical procedure which does not alter the product's chemical composition (Tise, Tr. 5834-5837; Graham, Tr. 7078-7079; Minkler, Tr. 107-108). Pasteurization is required before milk can be shipped in interstate commerce (Tise, Tr. 5829-5830; Graham, Tr. 7072). Borden sells milk to a wide range of customers including retail stores. Such customers are also

located in states other than the state of Illinois in which Woodstock is located (Minkler, Tr. 114; Malone DTR. 23-24). A substantial amount of the milk and dairy products processed at Woodstock was distributed through the Hammond, Indiana, Distribution Depot (Minkler, Tr. 102-103; Malone DTR. 26-28). The Hammond Depot primarily served customers in the state of Indiana (Minkler, Tr. 103). Among Borden's customers in this area were a number of A&P stores.

18. All of the acts and practices described above are and were performed in a constant current of commerce with raw milk flowing across state lines into Woodstock and processed milk and dairy products flowing across state lines to Borden's various customers including its largest chain store customer in the area, the retailer A&P.

D. The Negotiations

19. In late 1964 A&P decided to explore the possibility of selling private label milk and dairy products in the stores of its various divisions. Mr. Herschel Smith (Smith), A&P's Headquarters Dairy Buyer, held a meeting in New York City at which he explained A&P's new New York private label milk program and instructed the company's divisional purchasing managers to discuss with Unit Buyers the possibility of instituting similar private label programs in their various areas (Smith, Tr. 1350-1352; Bartels, Tr. 1862-1864). A&P's Middle Western Division Purchasing Director, Bartels, attended this meeting. Shortly thereafter and pursuant to these instructions he instructed A&P's Chicago Head Buyer, Schmidt, to initiate negotiations with Borden for private label milk (Bartels, Tr. 1862-1865).

20. Schmidt, A&P's Head Buyer for its Chicago Unit, was in charge and conducted the ensuing negotiations. Bartels, A&P's Middle Western Division Purchasing Director, supervised and was kept informed of Schmidt's over-all activities (Schmidt, Tr. 1668-1669, 1683; Bartels, Tr. 1865-1866; CX 12A).

21. Minkler, the President of Borden's Central District, was in charge of the ensuing negotiations for Borden. Minkler made all the decisions as to what to offer A&P and how to proceed. He communicated with Schmidt or Bartels on important occasions (Minkler, Tr. 123-125, 201-203, 225-228, 247-248; CX 7; Tarr, Tr. 885-887).

22. Minkler was assisted during the negotiations by Malone, Borden's Central District Vice President for Government Controls and Borden's expert cost accountant. Malone was very knowledgeable concerning all aspects of Borden's production and distribution expenses in the Chicago area and counseled Minkler concerning Borden's costs of serving A&P during the entire course of the negotiations (CX 262, Malone DTR. 6-8, 10-15, 29-32, 39; Minkler, Tr. 111-113, 309-310; CX 42, 54). Malone prepared all of Borden's costs analyses and most of Borden's private label proposals to A&P (CX 14, 18, 21, 23-28, 36, 42, 54, 62, 87). He was extremely well respected and was relied upon by both Borden and A&P officials (Minkler, Tr. 309-310). A&P's Bartels testified: "The Borden company...had...very sophisticated cost accounting and legal departments" (Bartels, Tr. 1894A).

23. Tarr was Borden's Central District Chain Store Sales Manager and handled most of the line contact with A&P during the negotiations. Tarr spent about 80 percent of his time servicing the A&P account (Tarr, Tr. 845-846, 848-850, 876-878).

24. Around November 1964, A&P asked Borden to submit a private label offer for Chicago. Minkler and Malone immediately prepared a Borden proposal which granted A&P a 1 cent discount per half gallon of private label milk provided A&P would accept drop delivery and limited service, that is, store door delivery with no in-store service, no special deliveries, and no returns except for inferior or defective products (CX 5, 6; Minkler, Tr. 133-134; CX 262; Malone, Tr. 32-33). The offer was transmitted to Borden's New York office in late November 1964 and turned over to A&P in New York on December 2, 1964. A&P refused this offer (CX-5, 6, 7F, 12; Minkler, Tr. 133-137, 140-142; Archer, Tr. 1209-1212).

25. Although Borden's profit margin in the Chicago area might be cut by a reduction in its price on private label products it could not refuse to make such a reduction because it was dependent on continuing to serve A&P (CX 7D-F).

26. Borden was also concerned with A&P's possible retailing plans for private label milk. A&P was in the

initial stages of implementing a nation-wide plan to install private label milk in its stores (Smith, Tr. 1350-1353). In some areas, including Columbus, Ohio, Dayton, Ohio, and Dallas, Texas, A&P had introduced private label milk at a lower out-of-store price than advertised label milk (CX 8G-I; Miller, Tr. 5975-5976, 5978). Smith of A&P had discussed at least some of the cities with Archer in connection with A&P's private label plans for Chicago (CX 7F). Borden felt that if A&P followed this policy and introduced private label milk at such a differential in Chicago a price war would follow and its profits would be destroyed (CX 7D-F; Minkler, Tr. 154-157).

27. Minkler prepared a new private label offer to A&P which granted a 2-cent per-one-gallon price reduction which Borden tendered to A&P in late January but which was also refused (CX 7G-I, 9, 11, 12).

28. On February 5, 1965, Smith of A&P requested A&P's Chicago Office to take over the negotiations. Bartels turned the matter over to Schmidt and he in turn called Tarr of Borden to request an offer (CX 11; Schmidt, Tr. 1688; Tarr, Tr. 849-851).

29. Schmidt told Borden that "he very much appreciated the sensitiveness of this market". He added that Borden "had to be right" if A&P was not to put its private label business out for bids (CX 12).

30. Borden thereupon prepared a full and complete offer to sell private label milk and dairy products in the Chicago-Calumet area of Illinois and Indiana (CX 14). The Chicago-Calumet area encompassed the A&P stores in the Chicago area, its immediate Illinois suburbs and the Calumet area of Indiana, including Gary and Hammond, Indiana. This area was served by a number of Borden distribution branches including Borden's O'Hare Branch at Irving Park, Illinois, and Borden's Hammond Branch at Hammond, Indiana (CX 262, Malone DTR. 72; Gose, Tr. 1072-1073; RAPX 68). Tarr delivered the offer to Schmidt on February 9, 1965 and discussed it with him (Tr. 850-852). Borden's new offer granted A&P a discount of 2.55 cents per-half-gallon off its then current price and commensurate reductions of the other 5 main items taken by A&P which products accounted for 70 percent of A&P's total sales of milk in the Chicago-Calumet area. Borden also quoted a private label price on 5 by-products. This offer indicated that Borden would realize only .45 cents per-quart gross profit on sales of the main homogenized Vitamin D milk products (CX 14D).

31. In May, Schmidt asked that Borden come up with a private label program for areas outside of A&P's Chicago-Calumet area. Such outside areas extended north to the Wisconsin state line, west into Iowa, south almost as far as Peoria, Illinois and east beyond South Bend, Indiana to Goshen, Indiana (Tarr, Tr. 856-857; CX 18C, E, G, L). Borden prepared such an offer setting different prices for each zone of A&P's outside areas for each product offered under private label for Chicago (CX 18, 17B, C).

32. A&P was not interested in having only some of its stores in Illinois or Indiana supplied with private label milk. Later, when Bowman was invited to bid, a list of all the A&P stores in Indiana, Iowa and Illinois was given it (Cannon, Tr. 6126-6127). The Dean Dairy was rejected when it bid only on Indiana stores (Schmidt, Tr. 1711). It is thus clear that the private label arrangement of A&P with its supplier was unavoidably interstate in character and that sales of milk to A&P stores in Illinois would be made only if A&P stores in Indiana were also served by the supplier.

33. Borden's May offer (CX 18-O) shows that the dairy expected to lose money on its sales of gallon containers of milk and that its gross profit on half gallons to be only .11 cents. Its total gross profit from sales of the higher volume containers (gallons, half-gallons and quarts) would be only $76.89 per week. The gross profit referred to takes into account only the cost of raw milk, containers, production, route delivery expense and other distribution expense.

34. A&P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and 25 percent of its Woodstock plant production. Borden could not, therefore, afford to lose the A&P business by refusing to lower its prices to A&P (CX 7F, 42 A-D). At the same time Borden feared that A&P might cut its out-of-store price for private label milk below the market price for advertised label milk (CX 7-D, E; Minkler, Tr. 155-157). Actually, A&P was selling private label milk at a reduced out-of-store price in two out of the three areas studied (CX 8 G-J) and had introduced private label milk at a reduced price in Dayton, Ohio in February 1965 (Miller, Tr. 5975-5976). Consequently, Borden believed that if A&P created such a differential the market price for advertised label milk would break and a price war would result (CX 7E). Such a price war had been experienced by Minkler and Malone in Wisconsin a year earlier and in

Chicago during the 1950's (Minkler, Tr. 155-156; Malone DTR 97-99; Soberg, Tr. 2753, 2754-2764). Such a price war would not only reduce profits of all dairies in the area but Borden particularly, because of its investment in the new Woodstock plant which cost over five million dollars (CX 13J). Many of the other dairies in this area were older and fully depreciated and thus had substantially lower fixed costs (Schaub, Tr. 3110-3111). Thus, if Borden reduced its price and A&P followed suit at retail level for private label milk, a price war might ensue and reduce Borden's profit. If Borden refused A&P's request for lower prices Borden would lost A&P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.

35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A&P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A&P contract but that it was presenting such a bid because A&P's business was vital to Borden's efficient use of its Woodstock plant. Schmidt pointed out that A&P's goal in its private label program was to increase its gross margin on milk. The Borden representatives, however, warned that this could not be accomplished if A&P reduced the price on private label milk, citing a price war that had occurred in Wisconsin as the result of private label pricing (CX 19E, F; CX 262; Malone DTR 97-98).

36. In July 1965 A&P asked Borden to revise its May quotations for the outside areas to take account of possible savings in delivery costs. On July 26, Tarr delivered the revised quotation to Schmidt (Tarr, Tr. 863-865; CX 21).

37. On July 26, 1965, Bartels of A&P met with Minkler to discuss Borden's costs and to push for lower prices. Bartels wanted to know why Borden's Chicago costs were higher than its New York costs and Minkler agreed to review the matter (Tarr, Tr. 863-869; CX 21, CX 22A-D, CX 25B).

38. Malone prepared a written response to Bartels' questions (CX 23-25A). This response indicated that the primary reason for Borden's higher costs in Chicago was that Borden's Chicago delivery costs were higher in that the Chicago dairy drivers were paid substantially more than their New York counterparts; that union limitations on types of delivery and stricter health regulations limited efficiencies in delivery in Chicago; that A&P stores in New York made larger average purchases; and that there was a greater density

of A&P stores in New York. Malone concluded that Borden's gross margin per quart would be .36 cents not .45 cents as previously calculated and pointed out that this margin figure did not include anything for either overhead or burden (CX 23C-G, 24D). This cost study was submitted by Minkler and Malone to Bartels on August 6, 1965, and discussed with him (Minkler, Tr. 202-203; CX 262, Malone DTR 114).

39. Again, in August, A&P requested Borden to lower its offering price on some of the by-products. On August 13, Tarr presented Schmidt with a new revised bid for both the Chicago-Calumet area and A&P's outside areas (CX 31, 36, 37). The new bid focused on A&P's profit as a result of the private label contract indicating that A&P's costs would be reduced some $410,000 (CX 37A-F, CX 36; Tarr, Tr. 869-871).

40. Nevertheless, Schmidt told Tarr that A&P was not satisfied and had decided to put the matter out for bids (Tarr, Tr. 871-873). Tarr had told Schmidt at various times that some dairies in the area might bid under their cost to get A&P's business (Tarr, Tr. 872). On August 18, 1965, Minkler told Bartels that other dairies might submit bids which included only out of pocket or direct costs leaving out all fixed charges, on the theory that these costs were already covered by their present business (Minkler, Tr. 213-214). Nevertheless, Bartels indicated that he was proceeding to get other bids.

41. Malone calculated that if Borden lost A&P business Borden's gross profit would be reduced more than 1.6 million dollars per year compared to the private label price reduction of some 400 thousand dollars (CX 42A-D, CX 262, Malone DTR 122-123).

42. During the latter half of August A&P asked Bowman Dairy, Dean Milk Co. and Sidney Wanzer & Sons to submit bids for A&P's business. Wanzer was not interested and the Dean Milk Co. submitted a bid for a part of Northern Indiana only, an area which A&P did not want served separately from Chicago (CX 45, 51A-C; Schmidt, Tr. 1711).

43. Bowman Dairy submitted an offer to A&P (CX 50). Schmidt immediately telephoned Tarr and told him that Borden's bid was "so far out of line that it is not even funny. You are not even in the ball park...this bid is so far different from yours that there isn't any comparison" (Tarr, Tr. 873-874). Schmidt added that even if Borden's promotions and other assistance were valued at $50,000 per year "this would not be a drop in the bucket" (Tarr, Tr. 874).

44. The next day, September 1, 1965, Schmidt met with Tarr and told him that the new development was "terrible" and that Borden's bid was "nowhere near", to which Tarr replied that some bids might "be screwy" and that he didn't see how anyone can sell any cheaper than Borden (Tarr, Tr. 873-874).

45. Malone had computed what a bid based upon direct costs only would be. Borden also knew that losing the A&P account would cost it about 1.6 million dollars per year. As Minkler explained (at Tr. 225-226):

> This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely [pure] guess. We had the $410,000 [bid] in, we were clearly told that an additional $50,000 wouldn't begin to cover the difference, there are [the] facts that we had to consider.
>
> In addition to that, we had this figure of one million six hundred some thousand dollars that it would cost us if we lost the business. We had to weigh that, and at some point, I said that it seemed to me that we had to consider doubling this $410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume for this brand-new plant that we were just bringing on stream.
>
> We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.
>
> I was told, save the business....

46. On September 8, 1965, Minkler and Tarr met with Schmidt to discuss a further Borden bid (CX 55E). Schmidt

"reiterated the conversations almost verbatim that he had with [Tarr], that [Borden's offer] wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding and...the whole thing" (Tarr, Tr. 876-887; Minkler, Tr. 226). Minkler offered to submit a new quotation which would yield A&P a saving of $820,000 per year, double the saving of Borden's then current bid. Minkler stated that this offer was made "on the basis of meeting competition" (Minkler, Tr. 227-228). Minkler also stated his belief that the bid submitted by Borden's competitors probably took only direct costs into account and were based upon "anyhow accounting" but that Borden could not lose A&P's business (Minkler, Tr. 227-228, 237-238, 376-377). Schmidt said "now you are in the ball park" and asked Minkler and Tarr to go back, spread the new savings figure to Borden's product line and write up a form of service (Minkler, Tr. 243-244; Tarr, Tr. 878-879).

47. During the following week Borden worked up a formal quotation including the 11 items previously offered under private label as well as glass gallons of homogenized Vitamin D milk and 2 percent milk. Tarr told Schmidt of this change in the offer and Schmidt said such change would be fine (Tarr, Tr. 880-882; Minkler, Tr. 244-245). The new bid was submitted to Schmidt's assistant by Minkler and Tarr on September 17, 1965 (CX 56, 57, 58; Tarr, Tr. 883; Minkler, Tr. 245).

48. Shortly thereafter, Schmidt called Tarr to reject the offer telling Tarr that Borden's bid was not fair to the other bidders who "did not bid on glass gallons" (Tarr, Tr. 883-884; Minkler, Tr. 245). However, the Bowman Dairy offer had specified glass gallons of milk (CX 50). Actually, A&P did not want to sell private label milk in glass containers (Schmidt, Tr. 1777-1780). Schmidt also told Tarr that Borden should "sharpen your pencil a little bit because you are not quite there" as a result of which Borden reduced its price somewhat (Tarr, Tr. 884-885, 963-965).

49. The Bowman bid was apparently based upon volume and A&P did not ascertain how a different volume would affect that Bowman bid except to determine that if Bowman sold less volume to fewer stores its prices would go up (Schmidt, Tr. 1760-1761). The Bowman bid also assumed certain possible days of delivery in the Gary-Hammond area. A&P did not ascertain how a change in such assumption would affect this offer.

50. Borden prepared a corrected bid spreading the 820 thousand dollars to the original 11 item private label product line (CX 62). Using the raw milk prices as of the first half of 1965, the savings to A&P would have been over 880 thousand dollars but since the raw milk prices had risen in the meantime the actual savings would be about 820 thousand dollars (CX 66B). The new bid reduced Borden's price for a half gallon of milk by 5.75 cents below its then current advertised label price to A&P and by about 3.2 cents below Borden's July 26 prices, the last price Borden had made any effort to cost justify (CX 62, CX 21).

51. Minkler and Tarr presented Borden's final bid on September 21, 1965. Minkler told Schmidt:

> ... I said, "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that *we are meeting a competitive bid*. *We know of no other way to justify this*. *You have to accept it on that basis*. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this [:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it." (Minkler, Tr. 247-248; emphasis supplied).

52. Mr. Tarr, a witness to the meeting, testified to the same effect:

> At the last of it Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said "Yes." (Tarr, Tr. 886; also see Tr. 1020).

53. Minkler also told Schmidt that the new bid was based upon "anyhow accounting" (CX 63A-D). Schmidt admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (Schmidt, Tr. 1782-1801).

54. Schmidt requested a letter from Borden stating that its prices were proportionally available to others (CX 66). Instead, Borden supplied a letter which stated only that Borden felt its prices were legal and that it was prepared to defend them (RAPX 2). This letter was not in Borden's usual form relating to offers which were available to others (Archer, Tr. 1254-1255, 1258). Herschel Smith, A&P's Headquarters Dairy Buyer, understood that Borden's letter did not say its prices were available to others (Smith, Tr. 1427-1429, 1438-1440).

55. Schmidt submitted Borden's new bid and Bowman's bid to Bartels noting that Borden's bid offered a savings of 820 thousand dollars while Bowman's savings amounted to some 737 thousand dollars. Schmidt recommended retention of Borden as did Bartels who forwarded it to Smith in New York (CX 66A-B, CX 65A-C; Schmidt, Tr. 1713-1716; CX 263). Smith noted that Borden's offer was "substantially better" than the one from Bowman and approved Borden on October 14, 1965 (Smith, Tr. 1369, 1413-1414; CX 263, 70). Borden commenced serving A&P in its Chicago area in November 1965 (CX 75A-J, 255B).

56. During mid-November 1965 Borden brought its service and delivery terms to A&P on Borden label products in line with those granted on A&P label products but at a substantially lower discount (RAPX 66). Thus, during 1966 and thereafter Borden's maximum discount to A&P taking the same service on Borden label products was 30 percent while A&P's private label discount was 35 to 38 percent.

57. On May 24, 1966, Borden increased its Borden label list price by .5 cents per point 2/ to reflect its increased container, labor and social security costs. At Borden's maximum discount of 30 percent this increase raised Borden's prices by .35 cents per point (CX 124, 125, 139, 140, 123, 138; Gose, Tr. 1110). Borden informed A&P of the price increase

---

2/ A point is equivalent to a quart of whole milk. Thus a gallon is measured as four points and a half gallon as two points. Some other dairy products have different point values.

and asked that A&P accept a commensurate increase on A&P label products (CX 79; Gose, Tr. 1050-1054; CX 262, Malone DTR 178-180). A&P accepted the increase on Borden label products but refused to accept it on private label products (CX 81; Gose, Tr. 1053-1054; CX 255B). The contract on private label provided that prices were to be subject to change to reflect increased container and labor costs (CX 62H-J, M).

58. Again, in March 1967, Borden asked A&P to accept the price increase to reflect cost passed on to Borden's other customers in 1966 pointing out that all of its other customers had accepted the price increase (Gose, Tr. 1056-1062; CX 102-103, 105, 106). A&P refused to accept more than a .2-cent per-point price increase on private label products (CX 102B, 106C, 110, 225B; Gose, Tr. 1058).

59. After the institution of the private label agreement with A&P, Borden reorganized its Chicago Central District merging it with another district. Minkler explained that this was necessary because of the reduction in income occasioned by the lowering of its price to A&P on private label products by some 800 thousand dollars (Minkler, Tr. 276-280). Job positions involving almost all facets of the Borden operation were eliminated within the Chicago region following the beginning of the Borden-A&P private label arrangement due, at least in part, to that new arrangement (Gose, Tr. 1069-1070).

E. Grade and Quality

60. Respondent A&P admits:

> [S]ubstantially all of the fluid milk products Borden supplied under A&P's private label to A&P stores [in the area of complaint counsel's proof] during the period November 1965-1970 were physically and chemically identical to the equivalent products contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and suburbs", Gary, Hammond and Valparaiso areas (A&P's Adm. Filed March 12, 1973, Par. III-6).

Borden admits substantially the same thing (Borden Adm. filed September 29, 1972, Par. III-10; Minkler, Tr. 250; Schmidt, Tr. 1727-1729).

F. Contemporaneous Sale

61. Respondent A&P admits that the fluid milk and dairy products sold by Borden under private label to A&P stores

in the area in question and contemporaneously under Borden label to competing retailer-purchasers, were commodities sold for use, consumption or resale within the United States (Comp. and Ans. Pars. 8, 9; A&P Adm. Par. III-6).

G. The Discrimination

I. The Gary-Hammond and Valparaiso Areas of Indiana

62. Burger's Super Markets, Inc., operated a supermarket in Hammond, Indiana, which competed with the A&P stores in Hammond, Indiana (A&P's Adm. Par. III-9(a)-(e); White, Tr. 2064-2065; Kristoff, Tr. 2285-2286). Burger's store purchased about two to five times as much milk from Borden as its A&P store competitors (CX 182; RAPX 234 p. 19) and was substantially larger than its A&P store competitors in Hammond (Kristoff, Tr. 2270-2271, 2381, 2385).

63. Model Food Center, Inc., operated a super market in Hammond, Indiana, also. A&P admits that the Model Food Center in Hammond, Indiana, competed with its A&P store #306 in the Hammond suburb of Munster, Indiana (A&P Adm. Par. III-9(a)-(e)) Model Food Center purchases of fluid milk products from Borden were commensurate with the A&P stores in the Gary-Hammond area with which it competed (CX 182; Barney, Tr. 3682-3688).

64. Wallies Market in Hammond, Indiana, purchased fluid milk and dairy products from Borden from 1966 until December 1, 1969. A&P admits that Wallies Super Market competed with one of its stores (A&P's Adm. Par. III-9(a)-(e)). Wallies bought approximately the same amount of milk from Borden as its A&P competitors during the period 1966-1969 (CX 182).

65. Wilco Food Center is a supermarket in Gary, Indiana. A&P admits that during the period 1964-1970 Wilco Food Center competed with one of its stores in Gary (A&P's Adm. Par. III-9(a)-(e)). Wilco bought substantially more than twice as much milk from Borden as the average A&P store in the Gary-Hammond, Indiana area (CX 182).

66. Joseph Tittle & Sons, Inc. (Tittle) operates and has operated a chain of supermarkets in Northwestern Indiana for many years. Between October 1966 and March 1967 Tittle owned and operated five supermarkets in this area, two in Gary, Indiana (Lake Street and Village Court), one in Hammond (Hohman), one in a suburb of Hammond (Highland), and one in Valparaiso, Indiana. Between 1967 and 1969

Tittle sold its Hohman store and moved its Village Court store to another location. Consequently, between 1969 and 1970 Tittle had two stores in Gary, one in Highland and one in Valparaiso. A&P admits that the Tittle stores competed with its A&P stores in such areas (A&P Adm. Par. III-9(a)-(e); Minard, Tr. 3136-3138, 3141-3148). The Tittle stores in Gary bought approximately the same volume of milk from Borden as the A&P stores in the area. In Hammond the volume of the Tittle stores was lower than the volume of some A&P stores but higher than others. In Valparaiso the Tittle store's volume was at least three times more than that of the A&P store (CX 182).

67. Burger's Market bought slightly more than 28 thousand dollars worth of milk products from Borden between October 1966 and March 1967. Had it been charged A&P's prices under A&P's private label agreement with Borden, Burger's Market would have paid $3,468.77 less. It, therefore, sustained a price discrimination of 14 percent. Between June 1969 and March 1970 it bought over 84 thousand dollars of milk products from Borden but would have paid $11,506.15 less had it been charged A&P's prices under the private label agreement, sustaining a 15.7 percent price discrimination (CX 187, 188A).

68. During the same two periods Model Food Center was charged $12,496 in the earlier period and $29,519 in the later period. Had Model been charged A&P prices under its private label agreement with Borden, Model would have saved $2,297 in the early period and $4,138 in the later period, thus experiencing a price discrimination of 22.5 percent in the early period and 16.3 percent in the later period (CX 191A, 187).

69. Wallies Market bought more than $14,000 worth in the early period and a similar amount in the later period. Had it been charged A&P prices under the private label arrangement it would have saved $2,193 in the earlier period and $2,203 in the later period reflecting a price discrimination of 17.5 percent for the early period and 17.6 percent for the later period (CX 200A, 187).

70. The Wilco Food Center paid more than $35,000 for milk products in the same earlier period and more than $71,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have

saved $4,550 in the earlier period and $4,433 in the later period. The price discrimination amounted to 14.5 percent in the earlier period and 6.6 percent in the later period (CX 202A, 187).

71. Tittle's Lake Street store paid more than $13,000 for milk products in the earlier period and more than $32,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have saved $1,571 in the earlier period and $1,939 in the later period. The price discrimination was 12.9 percent for the early period and 6.4 percent for the later period (CX 196A, 187)

72. Tittle's Village Court store paid Borden more than $12,000 for fluid milk products in the earlier period and more than $38,000 during the later period. Had it been charged the A&P prices under the private label agreement with Borden, it would have saved more than $1400 in the earlier period and more than $1800 in the later period, sustaining a discrimination of 12.5 percent in the earlier period and 5 percent in the later period (CX 197A, 187).

73. Tittle's Supermarket on Hohman Avenue in Hammond, Indiana, paid more than $15,000 to Borden for fluid milk products during October 1966-March 1967. Had it been charged A&P's private label prices from Borden, it would have paid more than $1800 less, reflecting a 13 percent discrimination during that period (CX 195A, 187).

74. Tittle's Supermarket in Highland paid more than $12,000 for fluid milk products bought from Borden during the early period or almost $1400 more than it would have paid had it been charged A&P's private label prices from Borden. This amounted to a 12.4 percent discrimination. During the later period of proof this store paid more than $23,000 for fluid milk products but would have paid $1,335 less had it been charged A&P's private label prices from Borden, thus experiencing a 5.9 percent discrimination (CX 194A, 187).

75. Tittle's Supermarket in Valparaiso bought approximately three and one-half times as much milk from Borden as the competing A&P store (CX 182). Nevertheless, during the first period it paid more than $51,000 for fluid milk products bought from Borden which was $7,603 or 17.5 percent more

than it would have paid had it been charged A&P's private label prices from Borden. During the second period of proof, it paid more than $111,000 for such products or $6,984 or 6.7 percent more than it would have paid had Borden charged it A&P's private label prices (CX 198A, 187).

76. Combined, the Tittle stores paid $13,804 during the earlier period in excess of what it would have paid had it been charged A&P's private label prices from Borden. This was an average of 15 percent more. During the later period the Tittle stores paid $12,104 more or 6.3 percent more than it would have paid had it been charged A&P's private label prices (CX 187).

77. The unfavored competitors described above purchased from Borden at lower discounts and at higher prices than enjoyed by A&P as a result of Borden's formula for pricing A&P private label products. This situation commenced with the institution of the private label program in 1965 and continued until it ended in February 1972 (RAPX 66; CX 187, 120-136, 288, 289; Bayma, Tr. 5932-5933; Kristoff, Tr. 2279; Barnes, Tr. 3852, 3914; Minard, Tr. 3155-3156).

II. The Chicago and Suburbs Area

78. A&P sold fluid milk and dairy products in all of its stores of the Chicago area as did all of Borden's other store customers in that area (CX 256, 183). Two of such other Borden's store customers were Mayfair Foods and Jim's Groceries, who competed with A&P stores in that area during February and March 1966.

79. A&P admits that its store No. 137 located approximately two blocks from Mayfair Foods drew customers from the area served by this independent food store (A&P's Adm. filed March 12, 1973, Par. III-11). This was corroborated by the store manager (Lasorso, Tr. 2644, 2646, 2686) who testified that he regularly compared his prices with the prices charged by A&P, and adjusted his prices in response to those of A&P. Customers of Mayfair and A&P shopped both stores.

80. Jim's Groceries was a member of Central Grocers Cooperative and was also known as Centrella store. It was located in Oak Park, Illinois, where it competed with A&P for the sale of fluid milk and dairy products during 1965

and 1966 (A&P Adm. Par. III-11). This is confirmed by the owner of Jim's Groceries (Cox, Tr. 3946-3948) who testified that he checked A&P's prices in setting his own prices and that A&P was a competitor.

81. Borden's price to A&P on A&P label products in the Chicago and suburbs area in February and March 1966 was equivalent to a discount from list price of about 36.6 percent (CX 183). In May 1966 Borden imposed a price increase on Borden label products but A&P refused to accept it on the private label products (Gose, Tr. 1052-1054) and thus A&P's effective discounts from Borden's list prices rose to 37.8 percent as of August 1966 (CX 180). This continued until April 1967 when A&P accepted a partial price increase.

82. Borden's discount schedule in January 1966 established a maximum discount on Borden label products of 30 percent off of list (CX 138) which discount was available only to customers taking 600 points or more per delivery and the same service as granted to A&P. Although CX 138 states Borden's maximum discount to be 28% for such customers, Borden also offered an additional 2 percent discount if the store was centrally billed (Gose, Tr. 1110).

83. During February 1966 Mayfair Foods purchased milk and dairy products from Borden in the amount of $2,736 and received a rebate of $818 or 29.9 percent of the list price. During March 1966 Mayfair Foods purchased $3,056 of such products and received a rebate of $915 or 30 percent of the list price. During the same two months the A&P store with which Mayfair competed paid a net price which reflected a discount of about 36.6 percent of its private label purchases or 6.6 percent additional discount above and beyond that granted to Mayfair Foods (CX 183).

84. Jim's Groceries' purchases of milk and dairy products in February and March 1966 totaled $2,269 and $2,661, respectively. Borden's rebates totaled $522 and $607 or 23 percent and 22.8 percent respectively for those months (CX 183), which was in accordance with Borden's published discount schedule since Jim's Groceries took only about 400 points per delivery and did not take limited service or central billing (RAPX 173, pp. 82, 84). The A&P stores in Oak Park paid a net price which reflected an effective

discount of about 36.6 percent during this period. These A&P stores were about the same size or smaller than Jim's Groceries, taking about 251 points and 419 points for each of the two stores (RAPX 173, pp. 109, 116, 118). Even if the A&P stores qualified for an extra 2 percent discount for limited service and another 2 percent for central billing, these stores should have been receiving discounts of only 23 and 28 percent, respectively, not the maximum 30 percent discounts set out on Borden's discount schedule or 36.6 percent they actually received. The discrimination thus experienced by Jim's Groceries exceeded 10.4 percent.

85. The five highest volume items under the private label contract were homogenized milk quarts, homogenized milk half gallons, homogenized milk gallons, 2 percent milk half gallons and skim milk half gallons. These items accounted for 80 percent of Borden's expected sales to A&P pursuant to the private label contract (CX 65). As will be seen from the attached Appendix, Borden's discriminations in favor of A&P on these items ranged from a low of 8.3 percent for quarts of milk to 18 percent or more on half gallons of skim milk. Borden's discrimination on half gallons and gallons of milk which accounted for more than 55 percent of Borden's sales to A&P range from 9.7 percent to 14 percent.

H. Injury to Competition

The attempt to discern the competitive effect of price discrimination has been said to be "roughly akin to explaining how to avoid harm in a snake pit" (Keck, Lawful Price Discrimination, 8 AntiTrust Bull. 381 (1963)) Here, however, the task is simplified.

86. As A&P admits, "fluid milk is one of the most important commodities carried in retail grocery stores... [I]t is a perishable, high-volume, fast turnover item sold by most food retailers. Milk is also a staple and is purchased [by consumers] more frequently than other products [sold in grocery stores]" (A&P Adm. filed March 1, 1973, Par. III-19, 24). This is confirmed by the testimony of non-favored Borden customers (Minard, Tr. 3149; Kristoff, Tr. 2274; Gintert, Tr. 2456; Barnes, Tr. 3861; Barney, Tr. 3686; Lasorso, Tr. 2650; Cox, Tr. 2951-2952). Consumers are familiar with the retail price of fluid milk products and consequently competing retail grocers price milk competitively (A&P Adm. filed March 1, 1973, Par. III-21; Minard, Tr. 3149; Kristoff, Tr. 2277; Gintert, Tr. 2447-2448; Barnes, Tr. 3861-3862; Barney, Tr. 3690; Lasorso, Tr. 2650; Cox, Tr. 3947-3951). Milk products are sometimes used as

price leaders which are priced below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products (Minard, Tr. 3153-3154; Kristoff, Tr. 2277-2278; Gintert, Tr. 2458; Barnes, Tr. 3862; Barney, Tr. 3691-3692; Lasorso, Tr. 2652-2653). Selling milk at higher prices than those charged by one's competitors would cause customers to shop at other stores and would hurt business (see foregoing citations).

87. A&P admits that profit margins have been notoriously low in the retail grocery business (A&P Adm. filed March 1, 1973, Par. III-23). This is confirmed by sales and profits summaries of the unfavored competitors of A&P (CX 184, 189, 192, 199A, J-Z, 201, 203). All of the unfavored competitors had pre-tax net profits of less than 5 percent of sales. Four of them had net profits of 2.3 percent or less and one had a net profit of less than 1 percent (see Appendix IV(in camera) submitted in complaint counsel's proposed findings).

88. In view of the consumers' consciousness of fluid milk prices, the importance of milk to the grocery store, and the low level of their profit on sales by grocery stores, the purchase price of fluid milk items has been important to the ability of food retailers to price these items at competitive levels. The unfavored competitors of A&P, had they received a larger discount from Borden on milk products, would have increased their net profits and permitted them to be more competitive. Some of them would have been able to lower the retail price of milk to the consumer, increase advertising or otherwise give better service (Minard, Tr. 3154; Kristoff, Tr. 2273, 2278; Gintert, Tr. 2455-2460; Barnes, Tr. 3860-3861; Barney, Tr. 3688; Losorso, Tr. 2653-2657; Cox, Tr. 3950-3951). The price discriminations experienced by the unfavored competitors on their purchases of milk and milk products from Borden when compared with A&P's prices on private label was at least several times larger than those stores' level of net pre-tax profit. In many cases the percentage of discrimination was as high or higher than the stores' level of gross profit on sales. Consequently A&P enjoyed a competitive advantage. Since it did not reduce the retail price of its private label milk, its lower costs were not passed on to the consumer but resulted in higher gross profits for itself (CX 255B; White, Tr. 2059).

I. A&P's Inducement or Receipt of Borden's Private Label Pricing

89. There can be little doubt that A&P induced Borden into granting the private label prices. Its behavior as outlined in the section of this decision dealing with the negotiations clearly demonstrates that A&P maintained unwavering pressure upon Borden to arrive at the prices finally agreed upon. It solicited a private label arrangement, first only for its Chicago-Calument area, then later for its outside areas, it hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids. It then informed Borden that its bid was not even "in the ball park." Finally, Borden, desperate to retain A&P business for its new Woodstock plant, made a bid which A&P could not refuse and the deal was closed to begin in November 1965 and to last until February 1972.

J. A&P's Knowledge that Borden's Bid was not Cost Justified

90. As detailed earlier in the section of this decision entitled Negotiations, A&P was made aware that Borden's price could not be cost justified. Borden repeatedly told A&P that its price was based solely on meeting competition and that it was intended to meet a competitive bid based on incremental costing. Moreover, Borden first offered A&P an $820,000 saving covering 13 private label items with an annual volume of $6.5 million. When A&P insisted that Borden drop its glass gallon feature, Borden revised its bid to cover 11 private label items with an annual volume of only $5.6 million (CX 56B-G, 62, 75F-J; Tarr, Tr. 884-885; Schmidt, Tr. 1777). A&P should have known that the same cost savings applicable to different products with different volumes would not likely be related to Borden's cost savings.

91. The study of Borden's Chicago-Calumet area costs in July 1965 was made by Borden's cost accountant, Malone, and was submitted then to A&P. This showed Borden's cost on gallons, half-gallons and quarts of milk to be higher than the final price per unit to A&P (CX 24D, 62C). Even when these costs were computed in February 1965, the final prices offered A&P for the two highest volume items, half-gallons and gallons of milk, were lower than Borden's cost (CX 14D).

92. Borden also told A&P that its cost of serving A&P stores outside of A&P's Chicago-Calumet area were higher than its prices. Borden reported its costs for the major whole milk items as follows:

Half-gallon	$.3167	
Gallon	$.6260	
Quart	$.1584	(CX 21U)

Borden's final offer was substantially below these costs, particularly for half-gallons and gallons (CX 62D-G). A&P should have known that Borden's costs were higher than the final price quotation. In May 1965 Borden's Mr. Malone spoke with A&P's Mr. Schmidt about Borden's costs and showed Schmidt that Borden's gross profit per quart was less than one mill (CX 19E). At that time Borden's cost for paper half-gallons of milk was $.3162. Borden's final price, averaged, was $.2866 for half-gallons in the outside areas.

93. Mr. Bartels also knew of Borden's costs having been presented with Malone's calculations (Bartels, Tr. 1869; Minkler, Tr. 203; Malone DTR p. 114).

94. It is also of significance that when A&P asked Borden for a letter stating that its private label prices were granted to others on a proportional basis, a statement which would have been in conformity with A&P's policy of obtaining such a written statement from suppliers (Smith, Tr. 1428), Borden replied

> ...Our prices are proper under applicable law and we are prepared to defend these prices (CX 263H).

95. A&P's Chicago officials made no effort to determine if Borden's private label prices were to be made available to others (Schmidt, Tr. 1729; Bartels, Tr. 1877).

96. It does not appear that A&P's New York office made any such inquiry (Archer, Tr. 1251). A&P's headquarters buyer for milk and dairy products who reviewed the Borden offer for legality (Smith, Tr. 1347) testified that he understood that Borden's letter did not state that Borden's prices were available to others on proportionately equal terms and was not the letter of availability that A&P

had asked for (Smith, Tr. 1406). He further testified, however, that he telephoned Mr. Archer, and held a conference with him about the Borden letter but that Archer assured him that the letter was a letter of availability and even more (Smith, Tr. 1407). Whereupon, he sent the Borden offer, their letter and a memorandum to A&P's legal department for review and that the legal department responded in writing (Smith, Tr. 1413, 1442). Archer, however, testified that he had no discussions with Smith regarding Borden's final Chicago quotation (Archer, Tr. 1246). Neither Smith's memo to the legal department nor the alleged legal departments' approval were offered in evidence. On balance, I do not credit Smith's version of the actions taken after the receipt of Borden's final offer.

97. A&P's trade experience also should have given it reason to believe that Borden's final price could not be cost justified. It was quite familiar with the dairy industry and methods of doing business in the industry at the time of the private label negotiations. Their officials had discussed private label milk for Chicago, the pricing of private label milk, Borden's pricing in the market, dairy pricing in the Chicago area as compared to pricing in other cities, private label pricing in other markets, competitive conditions, Borden's costs, etc. (Minkler, Tr. 201, 213, 227; Tarr, Tr. 857, 871, 897; Schmidt, Tr. 1684, 1687, 1692; Bartels, Tr. 1865; Smith, Tr. 1350; CX 7D-K, 12, 19, 22, 25B-E, 30, 31, 34, 43). Admittedly, one of its purposes in seeking private label milk for the Chicago area was to cut its cost of milk below the price it paid for Borden label products (Corbus, Tr. 7325; Smith, Tr. 1400). A&P also purchased fluid milk and dairy products in the Chicago area from other dairies in addition to Borden and must have been aware of the price level for these dairies (CX 256). It also knew that Borden's final private label price to A&P was substantially below Borden's advertised label prices to A&P since it was buying both from Borden.

98. Even A&P's costing guide lines indicated that Borden's private label prices had to be below Borden's cost. In 1964, A&P negotiated for the supply of private label milk by Glen & Mohawk Milk Associates for areas in upstate New York and Massachusetts. The president of that dairy told

A&P how a store customer could estimate a dairy's cost. He said that it could sell milk to A&P stores at a cost of approximately 6¢ per quart above the dairy's cost of raw milk. Two of such 6¢ went for cartons or fillers. Two more cents were attributable to plant costs and profit and the last two cents would cover delivery (Abrams, Tr. 6398-6399). Nevertheless, Glen & Mohawk's prices ranged from .28¢ to .65¢ per quart more than the prices Glen & Mohawk told A&P it might expect (RAPX 137A, 62, 63). Moreover, the 2¢ figure for plant costs would not necessarily apply in New York City because wage rates were higher there than those used in the formula (Abrams, Tr. 6402-6404, 6423). In addition, Glen & Mohawk's offer did not include milk delivery but was a dock pick-up price and did not guarantee delivery costs, the customer taking the risk of delivery (Abrams, Tr. 6388). Glen & Mohawk's delivery cost estimate would not necessarily apply in areas with different union wage rates and was based on an average per store delivery of at least 40 to 50 cases (Abrams, Tr. 6399-6401, 6425-6426). Finally, delivery costs were for sidewalk drop delivery and not for putting milk into the store (Abrams, Tr. 6396). In sum, the "2-2-2 formula" was merely a reference point from which to work and had to be adjusted for different conditions in different areas. A&P was told that in-plant wage rates in Chicago were substantially higher than in New York (CX 25C, 26). The average A&P store was taking less than 600 points or 25 cases per delivery (RAPX 233, p. 8). Union work rules and Chicago Health Regulations forbade sidewalk drop delivery and Borden, not A&P, took the risks of delivery (CX 23D-E, 62). Nevertheless, the final Borden offer granting prices to A&P for half-gallons and gallons of milk were .6 to .8 cents per point below Glen & Mohawk's prices (RAPX 137).

99. After the commencement of the private label contract, it was obvious to A&P that its private label milk costs were below its Borden label milk costs for which it got an effective discount of only 30 percent and not the 35 percent to 38 percent effective discount available on the A&P label products (CX 255B; RAPX 66). This was so, although Borden's services to A&P in connection with its Borden label sales were the same as those rendered in connection with Borden's private label sales. Products of both labels were delivered in the same trucks and in the same manner. Products of both labels were pre-ordered. Borden did not accept returns of either product after expiration of the code date and Borden did not provide any in-store or promotional services (CX 75A-B, RAPX 66, Supplement C, pp. 238-239). Thus, as of mid-November 1965, and thereafter, A&P should have known that its average

store in the Chicago Unit took less than 600 points per delivery (CX 24B, 27, 20H; RAPX 233, p. 8) but it was purchasing Borden label milk at a price of $.3430 per half-gallon and A&P label milk at a price of $.3124 per half-gallon. In January 1966, Borden offered other customers the same limited service option provided to A&P, provided such other customers took 600 points of milk per delivery. Such other customers, however, had a maximum discount of 30 percent off of Borden's list price. Actually, the discount was 26 percent off Borden's list price plus 1 percent additional for advance ordering and limited service plus 1 percent additional for limitation on returns plus an additional 2 percent for those customers which were centrally billed, for a maximum of 30 percent (CX 123, 138; Gose, Tr. 1110). A&P's private label cost was the equivalent of a discount ranging between 35 percent to 38 percent without regard to the volume taken by any of its stores. Borden's services to all were the same (CX 75A-B, 123, 138). Although Borden's private label contract did not offer salesman's services to handle promotions, its limited service to non-A&P stores also stated that Borden would not provide promotions (CX 123B; Lasorso, Tr. 2699; Barnes, Tr. 3910; Cox, Tr. 3992; Havemeyer, Tr. 9137-9138).

100. It thus is apparent that the only benefit lost by A&P in connection with the private label contract was advertising. But dairy advertising was not a big expense -- 2 to 3 mills per point or less (CX 54; Soldwedel, Tr. 3387, 3430). Indeed, Bowman told A&P that it could not justify any price difference between private label and advertised label products (Cannon, Tr. 6136).

101. A&P also knew or should have known that its price preference on private label products was increased in May 1966. Then Borden raised its price by $.0035 (at maximum discount) to cover increased costs of labor, containers and social security costs (Gose, Tr. 1047, 1110; CX 79, 123, 124, 125, 138, 139, 140). A&P refused to accept the price increase except on its Borden label purchases and Borden repeated its request in March and April of 1967. At that time A&P accepted only a $.002 increase (CX 81, 102, 103, 105, 106, 110, 255B; Gose, Tr. 1052-1058; Schmidt, Tr. 1723).

K. The Bowman and Borden Competitive Bids

102. As noted earlier, A&P had only two bids under consideration in 1965, the Borden bid and the Bowman bid. It compared the two bids on the basis of their prices on the private label products offered by Borden which was the only factor in which it was interested.

103. The Bowman bid was based upon a 3.5 percent butterfat content of milk. The Borden offer was based upon a 3.4 percent butterfat content. There is nothing in this record to indicate by what amount Borden would have increased its bid to supply milk with a butterfat content of 3.5 percent instead of 3.4 percent. Similarly, there is nothing in this record to indicate how much Bowman would have reduced its price to supply 3.4 percent butterfat milk instead of 3.5 percent butterfat milk. The two bids are not comparable with respect to butterfat content.

104. The Bowman bid, unlike the final Borden bid, included glass gallons of milk, but any comparison between the two bids based upon glass gallons of milk is improper inasmuch as A&P did not want glass gallons under private label and when Borden attempted to include such product, A&P told Borden to take it out. Glass gallons were therefore not included in Borden's final offer (CX 62, 66; Schmidt, Tr. 1777; Tarr, Tr. 883-884).

105. A&P argues that any comparison of the Bowman and Borden bids should include by-products which were not offered under private label by either Bowman or Borden. This is also improper inasmuch as A&P was not interested in such items (CX 62; RAPX 50).

106. The Bowman bid was actually inoperative. It was based upon a volume that A&P would not and could not provide. It was based upon an estimated total dollar volume of approximately $1 million per month using Chicago list prices. Bowman's letter to A&P stated:

> A substantial increase or decrease in the size of your order (compared to the assumption of dollar volume set forth above) would affect these prices.... (CX 50A; Cannon, Tr. 6149).

A&P's actual purchases using list prices totaled about $754,000 per month (CX 13A, 17B, C, 13H). This calculation is arrived at by taking the unit volume for one week, annualizing such figure and multiplying the result by Bowman's list prices for such units. Taking into consideration the fact that these calculations were for the early part of 1965 and that A&P's purchase volume declined later in 1965 and thereafter, it is reasonable to infer that Bowman's bid was subject to upward revision by reason of such substantial decline in volume (CX 75Z; Schmidt, Tr. 1684, 1731, 1737). This is confirmed by Bowman's table of price adjustments showing that its prices would be about 2.7 percent higher if A&P bought from Bowman's for only 70 percent of its stores and 3.1 percent higher if it bought from Bowman for only 50 percent of its stores (CX 50R; Schmidt, Tr. 1761). The Borden offer was not based upon volume (CX 62).

107. The Bowman bid was also inoperative with respect to deliveries. The Bowman bid was based upon three-day-per-week deliveries in the Gary-Hammond area of Indiana (CX 50L). Actually, it delivered milk six days per week in the Gary-Hammond area and could not reduce the days of service because of its union contract (Kalchbrenner, Tr. 9295; Banaski, Tr. 9534; CX 23D, 27, 31A; RAPX 246A). Although the Route Foreman for Borden testified that the union contracts permitted a 4-day delivery, he stated that the practice was 6-day delivery (Szczepaniak, Tr. 1287-1288). The 1965 contract provided that no change shall be made in days of route operation (CX 299i) and the 1967 contract states: "The present delivery system of 6-day operation shall *continue* in effect" (CX 300k, emphasis supplied). It is clear that 6-day delivery was the union practice and the requirement here.

108. In connection with the Bowman bid, A&P admits that it did not ask for and did not receive a letter or statement from Bowman stating that its prices were legal or proportionately available to others (Schmidt, Tr. 1848-1849).

L. Cost Justification

109. Joseph Malone, Borden's cost accountant, made several studies to determine Borden's direct costs of serving A&P with private label products. Reference has heretofore been made to CX 24D made in July 1965, in which Borden's direct cost for half-gallons, gallons and quarts of milk is shown to be higher than the final price per unit in CX 62C. CX 87 was prepared in June 1966 after the commencement of the private label program. It shows that while Borden was making a profit on Borden label sales, it was losing from $2,200 to $4,870 per week on the A&P private label business. CX 206 analyzes Borden's Chicago area sales for the 12 months of 1965 and the first eight months of 1966 and shows that Borden's *overall* profits in the Chicago metropolitan area fell precipitously in November 1965 and remained at almost a break even point in 1966, but it did

not segregate private label sales which represented more than 25 percent of Borden's Chicago area sales from Borden label sales (CX 42D).

110. Considering that the unfavored customers competing with A&P purchased as much as, if not more than, the A&P store purchased from Borden, that the cost of processing A&P's private label products was no less than its cost of processing the equivalent Borden label product (RAPX 232 Attachment II) and that, except for advertising, no differences in service or delivery terms existed between the labels, but that advertising expense was insufficient to relate meaningfully to the difference in prices Borden charged A&P compared to competing retailers, no price discrimination can be justified under the Robinson-Patman Act. There is no difference "in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered." Indeed, Malone's calculations demonstrate the necessary resultant difference in net income because of the unjustified price differentials.

A&P'S FACTUAL AND LEGAL CONTENTIONS

A. Count I

111. A&P contends that it made no misrepresentations to Borden during its private label negotiations. It notes the testimony of Borden witnesses to the effect that A&P's Schmidt asked Borden to eliminate glass gallons from its bid because other bidders did *not* bid on glass gallons (Tarr, Tr. 883-884; Minkler, Tr. 245-246). Although Bowman, the "other bidder" *had* offered a price on glass gallons, A&P contends that there was no misrepresentation to Borden. A&P contends that Schmidt was referring to a comparison he was preparing between the Borden and Bowman bids which was based on the earlier Borden bid and which did not include glass gallons. The testimony of Mr. Schmidt, however, is not persuasive. He admits that "my recollection is hazy ... I believe I recall that I was at that time reflecting the opinion of the Chicago unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level" (Schmidt, Tr. 1777-1778). On balance, I find the testimony of Tarr and Minkler more persuasive. A&P further contends that the reason for not desiring glass was irrelevant

because it would not have resulted in the slightest change in Borden's thinking or calculations. But that is not the point. A&P rejected Borden's bid to meet competition on a ground that was baseless, that is, for the reason that Borden's bid included glass gallons, an item which A&P falsely represented to be excluded from the alleged competitor's (Bowman's) bid.

112. A&P also contends that the bid was not induced or altered by a "sharpen your pencil" comment, arguing that it is doubtful that this comment was made at all and, if it was made, it almost certainly was made at a stage in the negotiations when it did not affect Borden's final quotation. This ignores the credited testimony of Mr. Tarr who said:

> This thing that I say about sharpening the pencil was just toward the very end of the thing. It was after all these things had been talked about and *before* we brought over the final papers. (Emphasis supplied, Tr. 985).

113. A&P further contends that there was no misrepresentation by it even if it conveyed the impression to Borden that Borden's bid merely met Bowman's bid rather than actually beating it. It argues that, even if the Borden bid was lower by some $82,000, the difference was less than 1.5 percent of the total business involved and that therefore comments by A&P like "in the ball park" and "substantially met the other quotes" would appear to be quite accurate. The difference in savings between the Bowman and Borden bids amounted to approximately $145,000. With the adjustment for the increase in raw milk costs, Borden's bid offered A&P a savings of some $820,000 while the Bowman bid's savings amounted to some $737,000. The difference in these two savings amounted to some $82,000 or 11 percent of the Bowman bid savings which is not a *de minimis* amount, particularly in the grocery or dairy business. Even a comparison of the differential in savings to the total business involved, the 1.5 percent referred to by A&P, would not necessarily be *de minimis* in the grocery store industry where net profits of some retailers did not exceed such percentage figures. Here 1.5 percent represented about one-third or more of the unfavored competitors' pre-tax net profits (See Finding 87, *supra*).

114. Perhaps the most meaningful misrepresentation by A&P was that it had a competitive offer with which it could compare the Borden offer. The Bowman bid, unlike the Borden bid, was conditioned upon a certain minimum dollars' worth of sales to A&P. Moreover, the Bowman bid was based upon its assumption that it could deliver three days a week in the Gary-Hammond area of Indiana, but this was incorrect. Bowman delivered milk to stores in this area six days per week and could not reduce its days of service because of the union practice and requirement that milk be delivered six days per week to stores (See Finding 107, *supra*). It follows, therefore, that A&P actually did not have a competitive bid from Bowman to compare to the Borden bid. Although A&P attempts to minimize these differences and to explain them away, the fact remains that Borden was asked to meet an unrelated bid which was therefore not competitive. A&P's calculations to arrive at a price Bowman would have bid if conditions were identical are conjectural and not factual. They cannot be accepted.

115. There can be no doubt that when A&P accepted Borden's offer it understood that Borden had granted a substantially lower price than that offered by Bowman, the only other competitive bidder if, indeed, there was an offer which could be compared with Borden's (See Finding 55, *supra*). When it told Borden that its offer was being accepted after Borden had told A&P that it was submitted only to meet competition, it misrepresented the situation to Borden.

116. A&P argues that complaint counsel seek to enact "a rule requiring all buyers to tell all sellers who indicate that they are bidding against competitors what the competitors' price is", citing *Beatrice Foods Co.* v. *Kroger Co., Inc.*, 76 FTC 719, *aff'd* 438 F.2d 1372, *cert. denied* 404 U.S. 871 (1971), as well as *Forster Manufacturing Co.* v. *FTC*, 335 F.2d 47 (1964). This is just not so. As the court held in *Beatrice*:

> The controlling point here is not the 'hard bargaining' nor the price levels but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price (438 F.2d at 1378; emphasis in original).

Here, A&P misrepresented the situation to Borden. It knew or should have known that there was no operative bid from Bowman. Nevertheless, it told Borden that it had such a bid and when Borden made it quite clear that it was submitting its bid to meet the competitive offer A&P made no effort to disabuse Borden of that belief, although it understood that Borden had beat that bid. There was no obligation upon A&P to divulge the name of the competitor or the actual price offered by a competitor. It was sufficient if it had informed Borden that the meeting competition defense was not available. In failing to do so it misrepresented the situation to Borden and it was this misrepresentation that was a violation of Section 5 of the Federal Trade Commission Act. As the Commission concluded in the Health Hazards Statement (29 Fed. Reg. 8354-8355 (1964)):

> In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct.

A&P failed to meet that standard. As the Health Hazards Statement further points out:

> No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the example should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If *all* three factors are present, the challenged conduct will *surely* violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is

> exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or other.

A&P's misrepresentation was within an established concept of unfairness (see Beatrice, supra); it was unethical and it did cause substantial injury to Borden as well as to A&P's competitors (See Findings 59, 62-88, supra).

117. A&P contends that its conduct caused no injury to Borden or to Borden's employees arguing that Borden's merger of its Chicago Central district with the Midwest District in Columbus, Ohio, was a normal part of Borden's operations in order to improve efficiency levels. This disregards the testimony of Mr. Minkler (Tr. 279-280) which attributed the reorganization to the loss of Borden's income occasioned by the private label contract. That the reorganization had other justification referred to by A&P to improve efficiency does not necessarily invalidate the fact that I have found supra (Finding 59), that at least in part the reorganization was prompted by the reduction in income caused by the private label contract. Nor does Borden's 1966 annual report making no reference to the loss of income from the private label contract necessarily invalidate such a finding inasmuch as a company might not regard an annual report to be the most auspicious place to speak of income losses due to a private label contract.

B. Count II

Count II of the complaint charges A&P with knowingly inducing or receiving price discriminations in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

1. The Discrimination

118. A&P attacks the calculations made by complaint counsel for the prices paid by non-A&P store customers to Borden for products purchased by A&P under its private label program, arguing that complaint counsel has failed to properly authenticate the underlying Borden rebate information relied upon. It states that the rebate checks relied upon by complaint counsel were incomplete, citing three instances. In Burger's Supermarkets, A&P notes that a second check from Borden was never included in complaint counsel's calculations. The amount of this second check was $207.63. Even were it to be included,

it would scarcely diminish the discrimination suffered by Burger's Supermarket which experienced thousands of dollars in higher costs incurred. A similar inconsequential discrepancy is mentioned in connection with Model Food Center where the rebate check does not tally exactly with the method of calculation. This rebate check amounted to $79.36 and should have amounted perhaps to $8.00 more. A&P also objects to complaint counsel's failure to include certain payments by Borden to Wilco and Tittle. These appear to be checks for interest payments with no relation to the volume of purchases by these companies and would have insignificant impact upon the price discrimination calculations.

119. In addition, A&P contends that the documents relied upon by complaint counsel were incomplete. But the subpoena for this information to Borden required all documentation necessary to show the net price to customers and it appears that such was provided. Moreover, the rebate checks used by the Commission's accountant tallied almost exactly with Borden's worksheets. Under these circumstances it appears that the data used by complaint counsel were authenticated sufficiently.

120. A&P also attacks complaint counsel's calculations for non-A&P customers in Illinois, arguing that discounts greater than those shown on Borden's discount schedule were offered on a customer-by-customer basis. Although complaint counsel's accountant was not able to reconcile the price book amounts with the price lists in some of his spotchecks, it was apparently due to such things as the illegibility of entries and the inclusion of butter which was not on the price list and did not necessarily indicate that these customers were not charged these prices (Bitting, Tr. 4882). Moreover, such additional discounts were apparently given on small volume by-product items and would not substantially alter the overall pricing pattern (CX 288 D,R,S; Bitting, Tr. 4225-4231, 4234-4236; Soldwedel, Tr. 3421).

II. The Representativeness of the Stores

121. A&P further contends that while complaint counsel may have shown that A&P's discriminatory price caused injury to those Borden customers discussed by complaint counsel, this showing is not sufficient because these stores were not "representative" of all purchasers from Borden. It is doubtful that complaint counsel has such a burden.

In Beatrice, supra, the Commission said:

> The Robinson-Patman Act requires consideration of secondary line injury on a location-by-location basis. Each local competitive area, each Kroger store location, becomes the competitive environment within which the potential effect on competition with Kroger must be examined. (76 FTC at 805)

The Commission noted that in Foremost Dairies, Inc. v. Federal Trade Commission, 348 F.2d 674 (5th Cir. 1965), cert. denied, 382 U.S. 959 (1965), the only competitive environment examined was the city of Albuquerque, New Mexico, in which were located some eight stores in a small chain which received favored prices. Only one of these stores was located in proximity with an unfavored Foremost customer. Here, local competitive areas were examined. In the Gary-Hammond area of Indiana, A&P's five largest independent grocery competitors paid substantially more than the A&P stores in that area during the six month period from October 1966 through March 1967 and the later ten month period from June 1969 through March 1970. Similarly, the Tittle store in Valparaiso paid substantially more than its competitor A&P store. On the O'Hare route Borden's cash store customers purchasing $800 or more of milk per month paid substantially more than A&P for fluid milk products sold under private label (See Findings 62 through 77 supra; also CX 183). These price discriminations have been found to be meaningful and productive of injury to such non-favored competitors of A&P. In a secondary line competition case, the Supreme Court has said that it is

> self evident...there is "a reasonable possibility", that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers (Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

As the Commission stated:

> It seemed self evident that where a producer is selling a homogeneous product, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower

> price to one or some of the competing retailers not only 'may' but must have the effect of substantially lessening competition (Sun Oil Co. 55 FTC 955, 962 (1959).

Although the Seventh Circuit seemed to inject a necessity to make "realistic appraisals of competitive impact" in its decision in American Oil Co. v. Federal Trade Commission, 325 F.2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964) even that court assumed competitive injury upon a showing of different prices charged competing customers where the differential was "substantial and sustained" (Bargain Car Wash, Inc., v. Standard Oil Co., (Ind.), 466 F.2d 1163, 1174 (1972)). Assuming nevertheless, that the representativeness of the non-favored stores selected by complaint counsel here must be shown, I find that burden to have been met. The discriminations and injuries shown here involved local competitive areas of Gary-Hammond, Indiana, where A&P's five largest independent grocery competitors' costs were compared with the A&P stores' costs in the same area. In the Valparaiso, Indiana, area the Tittle store was compared with its competitor A&P store. In the Chicago and suburbs area Borden cash store customers were compared with A&P stores. In the Indiana area the purchases of the unfavored competitors represented more than two-thirds of all of Borden's non-A&P store wholesale sales in the area (RAPX 234, p. 19; CX 182). In the Chicago and suburbs area, the unfavored competitors chosen represented more than 40 percent of Borden's total sales on its O'Hare wholesale routes, which in turn represented a major part of Borden's total sales in the Chicago area (Compare RAPX 233, p. 69 Col. (1), with p. 8, 1, 6, Cols. 7, 13; RAPX 76; Bitting, Tr. 4788-4789, 4815-4816; CX 211D; Gose, Tr. 1072).

122. A&P contends that the cost comparisons are defective because they do not compare all of the allegedly injured competitors' dairy purchases from Borden against all of A&P's purchases but only against A&P's private label purchases. In the Beatrice case, respondent Kroger raised the same argument. There, however, Kroger, in addition to its private label purchases, was an unfavored purchaser of Beatrice labeled products and argued that its purchases of both lines should be considered in assessing injury. (The situation here is even stronger in that there is no claim that A&P was an unfavored customer in its purchases of Borden label products.) The Commission held:

> We think the proper inquiry is whether Kroger by obtaining cheap milk under its own label was given a competitive advantage which it used to potential injury of its competitors (at 806).

The Commission went on to hold that only the Kroger purchases of private label products were the correct measure of competitive injury and discrimination since Kroger's purpose in purchasing private label products was to obtain an overall advantage over its competitors since it used the private label milk "for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors." In that case Kroger, as did A&P, purchased private label milk at a cheaper price but sold it at the higher price of brand label milk, thereby reaping higher profits. It did not pass any of its cost savings on to the consumer. Moreover, Kroger continued throughout the period of discrimination to purchase the various items under both private label and brand label. A&P, however, carried the products in question under both labels for only a short introductory period. From October 1966 on, it purchased little or no Borden label milk products, so that it enjoyed a preferential price on all its milk purchases. Thus, except for a few months, whether or not A&P's Borden label purchases were aggregated with its A&P label purchases would make little difference in the calculation of A&P dollar advantage over its competitors.

123. A&P also contends that complaint counsel's proof of injury was insufficient, arguing that Borden's discrimination in favor of A&P lasted only briefly. This ignores the evidence of record that the discrimination lasted for years. A&P also cites evidence to the effect that the unfavored competitors could purchase milk at prices below those charged by Borden. There is no evidence, however, that such competitors were offered prices which even came close to A&P's substantial discount at the times in question (Gintert, Tr. 2492-2496; Minard, Tr. 3256-3258; Kristoff, Tr. 2329).

III. Knowledge

124. A&P also argues the issue of knowledge. I have already found that Borden's Minkler told A&P that the Borden bid was to meet a competitive bid only and that A&P's Schmidt said that he understood (Findings Nos. 51, 52, 53, supra). Moreover, I have found that A&P's officials understood that Borden's bid was "substantially better" than the Bowman offer (Finding No. 54, supra). Nor did A&P have any reason to distrust the representations of Borden since it admittedly had a high regard for Borden's cost accounting and legal

departments (Finding 22, supra). A&P's Schmidt admitted that he considered Tarr, Minkler and Malone of Borden "honest and forthright" (Schmidt, Tr. 1843). A&P's argument also ignores the fact that it knew Borden's cost savings were made without spreading it to individual products and that when it did make such a spread, it changed the products covered and the prices without changing the savings which could hardly be the result of cost differences attributable to differing methods of sale or different quantities sold. Moreover, A&P realized that Borden removed the statement "these prices are available to all on a proportionally equal basis" from its private label price change tables. Since it was A&P's policy to require such statements A&P should have known or surely been put on notice that Borden's new private label prices were not available to others.

125. A&P also attacks the reliability of Borden's cost studies arguing that they do not reflect savings Borden could expect from the introduction of the private label program. It attacks the Malone studies which show Borden's direct costs to be higher than the final price agreed upon to A&P, arguing that certain inconsistencies and irregularities make these studies unreliable. This position, however, is difficult to reconcile with the testimony of A&P's witnesses who considered Mr. Malone to be expert, forthright and honest. If so, A&P then must have known at that time that the price it had wrested from Borden was below Malone's calculations of cost.

126. A&P relies on Smith's testimony that he was assured by Borden's Archer that Borden's letter was a letter of availability and even more, which testimony I have not credited, preferring to believe Borden's Archer who denied such conversation. A&P contends that Archer must have seen Borden's letter and lied when he said he didn't see it, because, as A&P contends, Archer had all the other materials sent to New York on the negotiations. The evidence shows, however, that Minkler forwarded two sets of Borden's final proposal to Mr. Pentz in New York (CX 64A). Minkler forwarded one copy of the legal letter to Pentz but this transmittal contains a penciled note which does not indicate that Archer was sent a copy of that document (RAPZ 3). Moreover, since Archer had been promoted Executive Vice President of Borden earlier and would not have been as deeply involved in the affairs of the milk division as previously, it is not likely that he would have reviewed the legal letter from Borden. A&P also notes that in 1967 with reference to another bid

by Borden it asked Borden what was meant by language similar to that on Borden's legal letter here. On that occasion Borden replied that it meant the price would be available to others. No explanation is offered, however, why similar inquiry was not made by A&P at this time. The fact that Borden gave it such a meaning at another time, later, cannot relate back to an earlier period of time without supporting evidence.

127. A&P disputes that its trade experience would have led it to believe that Borden's final prices could not have been cost justified. I have found, however, that A&P was quite knowledgeable about the dairy industry (See Findings Nos. 97, 98, supra). A&P argues also that Borden expected reduced costs as a result of its new Woodstock plant. But we are here concerned with differences in the costs, not expectations which may or may not be realized. Nor is it relevant that A&P could get better prices on private label in other parts of the country. We are here not concerned with other parts of the country. Nor is A&P's reliance upon the costing guidelines of the 2-2-2 formula appropriate where, as I have found, this formula was a mere reference point and was subject to adjustments for local differences which would make it inapplicable to the Chicago area.

IV. Meeting Competition

128. As respects the issue of meeting competition A&P argues that although its officials thought the Borden bid was "substantially better" than the Bowman bid in 1965 its review in 1973 shows that in fact the Bowman bid was better. I have found, however, that the Bowman bid was not comparable to the Borden bid. Unlike the Borden bid it was based upon a certain anticipated volume of sales with a higher cost if the volume declined, which it did. It was also based upon a certain delivery schedule which was impossible of performance due to union practice and requirements. Although A&P attempts to develop the change in the Bowman bid with a corrected delivery schedule, the correction is A&P's estimate and not Bowman's. A&P also adjusts both the Bowman and Borden bids to reflect the same butterfat content of the milk, inasmuch as the Bowman bid allegedly specified a 3.5 percent butterfat content compared to the Borden milk which was 3.4 percent butterfat. Again, this is a correction by A&P and not by either Borden or Bowman. But it doesn't appear that A&P was interested particularly in the butterfat content as long as it met the legal minimum requirements (Schmidt, Tr. 1727-1729).

A&P uses Borden calculations to raise Borden's price for 3.5 percent butterfat milk using Borden's adjustment of its raw milk cost. This does not necessarily mean that Borden's price would be similarly adjusted *by Borden* had A&P asked for a different butterfat level. In addition, since the Borden butterfat level was about 3.45 percent anyway (Walker, Tr. 5513) and Borden was desperate to keep the A&P business, Borden would not necessarily make any adjustment in its prices to raise the butterfat content to 3.5 percent (CX 62X; Havemeyer, Tr. 6779; RAPF 130, p. 134).

129. Above and beyond the foregoing obstacles to an adjustment of the Borden bid to conform to what was felt to be the Bowman bid, that is, 3.5 percent butterfat content, there appears to be serious doubt that the Bowman bid actually called for 3.5 percent butterfat content. Such was not the impression of the negotiating individuals in 1965 but was only the result of second thoughts generated by a review of the bids at the request of A&P counsel in 1973. The testimony of the witnesses, however, indicates that the Bowman bid was based upon a 3.5 percent butterfat content of the class I raw milk and not the butterfat content of the processed milk (Smith, Tr. 1415-1417, 1445-1450; Schmidt, Tr. 1815; Bartels, Tr. 1897). Indeed, a Bowman official, Mr. Cannon, testified that the Bowman offer did not contain any specifications compelling Bowman to supply at any particular butterfat level (Cannon, Tr. 6187-6188). This was confirmed by the Commission's expert dairy economist (Walker, Tr. 5450-5453). In fact, this expert found that Bowman's butterfat level in 1965 was actually lower than Borden's butterfat level judging from the handler's reports which he examined (Walker, Tr. 5461).

V. Cost Justification

a. Attacks upon Malone's calculations

130. With respect to cost justification, A&P first attacks the computations by Malone as erroneous and unreliable. Specifically, CX 54 purporting to show Borden's cost to permit Borden to make an additional savings proposal to A&P is attacked because Malone allocated the costs on a point basis rather on the individual packages involved. But higher priced and lesser volume by-products are more costly to handle so that a cost computation by the number of units could not clearly reflect actual cost whereas a cost computation by points in which these higher priced and lower volume by-products are given higher point values would be more nearly accurate (See CX 7A). Moreover, since

Malone was seeking to ascertain the direct costs of A&P's business it was sufficient for his purposes apparently to ascertain overall costs and relate them to the A&P volume. That Malone was familiar with costs can hardly be disputed and Malone did consider A&P's volume of business (Malone, DTR pp. 148-151). A&P also attacks CX 54 because the costs therein are higher than CX 4, a Borden calculation of costs pertaining to Borden's operations in Wisconsin in August 1964. But CX 54 relates to Chicago and to 1965. A cost study which is neither contemporary nor based on the same market areas is hardly relevant and cannot be the basis for discrediting CX 54 which was prepared for the correct time period and locality, particularly when it appears that the highest labor rates are in Chicago as against all other dairy rates in the United States (Schaub, Tr. 3305) and where costs were increasing during 1964-1965 (See Resp. A&P's Proposed Findings, pp. 380-381).

131. CX 54 is supported by CX 87, another calculation prepared by Malone some 10 months after CX 54. In CX 87, Malone calculated costs experienced selling to A&P by two different accounting methods and in each case found that Borden was selling private label to A&P at a loss. Although A&P argues that CX 87 does not relate specifically to Borden's cost of serving A&P, citing Malone DTR p. 240, it appears that Malone was speaking of another exhibit, CX 13, at that point. With respect to CX 87, Malone testified:

> The three documents representing 87A, B and C were developed in an attempt to reconcile our position as to which would be the best course to follow. Number one, we had the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what our position would be, either lose or gain, and relate to where we would be if we lose all of the business. (Malone DTR 184-185).

132. A&P also argues that CX 87 be disregarded because "the data used to determine the Borden costs shown on that exhibit were unavailable to A&P at the time of trial." This objection is now being raised for the first time in connection with CX 87. A&P's motion to strike CX 87 on November 30, 1973, objected to the admissibility of that document on the ground that it was neither past recollection recorded nor a business record. These objections were overruled (see my Order of March 5, 1974). It ill becomes A&P to show concern for the

absence of underlying data to CX 87 literally years after such objection would have been timely and appropriate, that is, when Malone gave his deposition (Malone DTR pp. 229-250), or at least on November 30, 1973, when it moved to strike CX 87.

133. A&P also disputes CX 87 in that it compares the prices of the products sold to A&P on the O'Hare branch. Inasmuch as the O'Hare branch is the highest price area covered by the Borden A&P contract (CX 62) whereas Malone used an average price for all A&P stores including stores with lower prices than those from the O'Hare branch it necessarily follows that the average price arrived at for all will be lower than that at the O'Hare branch.

b. Burden of Proof

134. A&P contends that complaint counsel have not proven that the price discriminations were not actually cost justified and that they have not carried the burden of proof required under Section 2(f) of the amended Clayton Act, citing Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). Complaint counsel must come forward with evidence which proves both that the prices paid by the respondent buyer were not in fact cost justified and that the buyer knew or should have known this fact. Where, however, the buyer knows he is receiving a substantially lower price although the quantities in which he buys and the manner and amount of exertion with which he is served by a seller is the same as for his competitors

> ...the Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitors (346 U.S. at 80).

Even under Canteen, complaint counsel have met their burden here. The competitors were charged a higher price for Borden's milk products despite the fact that they took at least as much and often more than the individual A&P store with which they were competing. Further, although their service requirements were in some cases greater than that required for A&P they could have had the identical services but still at a higher cost than A&P was paying. Thus, with all differences in quantity and service eliminated there were no cost differences with the possible exception of advertising which I have found to be negligible in this particular situation.

135. Nor can it be denied that A&P knew or should have known that the methods of service and the quantities it purchased were the same as its competitors. A&P, not a novice in the dairy retailing business, certainly knew that Borden's prices were set according to its price lists and discount schedules. Moreover, it appears that A&P was purchasing Borden label products at the same prices that were charged its competitors. A&P officials and Borden officials discussed pricing patterns in the Chicago area as compared to pricing in other cities and even if A&P did not see Borden price lists it certainly knew the general contents and could have solicited further information (Tarr, Tr. 857-859; CX 12B, 19). Under these circumstances and in view of A&P's other knowledge of Borden's prices and costs A&P clearly had the duty to inquire to determine whether its prices were legal. In Fred Meyer, Inc. v. Federal Trade Commission, 359 F.2d 351, 365-366 (9th Cir. 1966), it was held that "Meyer had a knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal...the duty to inquire [thus] arises."

The Commission has held

> Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer the Commission need only show to establish its prima facie case that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor... However, assuming the matter to involve different methods or quantities if complaint counsel show such facts and circumstances as would have given the buyer reason to believe based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded to him, they would have met their initial burden (Suburban Propane Gas, Corp. 71 FTC 1695, 1698-1699, n. 2 (1967)).

A comparison with the Beatrice case is also appropriate. In that case complaint counsel were held to have met their burden of proof, relying upon Kroger's market knowledge, the fact that it did not seek evidence of cost justification from the various bidders, and the fact that Beatrice's pricing to Kroger was on a cost-plus basis, whereas Beatrice was selling to competitors on a list-price-minus-discount basis which was not based on actual costs (supra at pp. 820, 821). In that case there was no communication between the parties concerning cost justification. Here, however, Borden submitted detailed cost data and informed A&P that its bid could only be justified on a meeting of competition. By any approach, therefore, complaint counsel have met their burden of proof to demonstrate that Borden's price to A&P was not cost justified and that A&P knew or certainly should have known that such was the case.

c. Havemeyer's Cost Studies

136. In rebuttal to the contemporaneous Malone Studies (CX 54B, CX 87A-B) and other cost data (CX 21U, CX 23-25A, CX 206), A&P submitted three basic cost calculations, RAPX 232, 233 and 234. RAPX 232 purports to demonstrate that Borden could have expected to earn a profit on its private label price proposal to A&P. This exhibit purports to calculate the total cost of processing, transportation to branches and delivery to the store, of A&P private label items based on costs of Borden for May 1965 or for other periods in determining some of these costs. It compares such cost to the private label price granted to A&P in September of 1965 to arrive at a calculated weighted margin per point for Borden in its sales of private label dairy products to A&P. It breaks down the total cost into seven categories: direct material costs; processing costs; trailer loading; hauling to branches; truck loading at branches; delivery; and indirect marketing general and administrative costs. RAPX 233 compares Borden's cost of serving A&P stores with that of 28 competitors on Borden's O'Hare routes in March 1966. RAPX 234 compares Borden's cost of serving A&P stores with that of five competing purchasers in 8 store locations in Hammond and Valparaiso, Indiana, in October 1969.

137. These studies were prepared by Mr. Robert G. Havemeyer (Havemeyer), called as a witness by respondent A&P. Havemeyer is a management consultant and a partner in the management

consulting firm of Case & Co., and has been with that company and its predecessor firm, Stephenson, Jordan & Harrison, since 1953. His professional career has been very largely devoted to cost accounting in the dairy industry (Havemeyer, Tr. 6770-6775). He did not, however, base his studies upon any personal observations of Borden's operations and based his study upon only a portion of Borden's records which portion had been selected by someone else (Daube, Tr. 6704-6705). He did not partake in the process of selection or even review all of the available documentation to determine the completeness and representativeness of the selection (Tr. 7520). His experience included only one other Robinson-Patman cost justification study presented in a litigated case (U.S. v. Borden (Bowman), 370 U.S. 471 (1962)). (Tr. 6769-6775, 9131-9132).

i. Delivery Costs

138. Of critical importance is his calculation of delivery costs, being the most important and largest expense item with the exception of direct material costs. Havemeyer originally calculated them using Case & Company's wholesale milk delivery time standards. Complaint counsel objected to the admission in evidence of such time standards on various grounds. By order dated September 11, 1974, I overruled complaint counsel's objections insofar as they were based upon alleged unreliability, immateriality or irrelevance. However, by order of September 16, 1974, I sustained complaint counsel's objections to Havemeyer's studies insofar as they were based upon Case & Company's time standards because data underlying the conclusions reached on these studies were not produced (RAPX 232, pp. 89, 76; RAPX 233, pp. 39-66; RAPX 234, pp. 3-10). Consequently, the ultimate conclusions of Havemeyer for the cost of this function have been excluded and no meaningful comparison is possible between his studies and the cost calculations prepared by Malone. (See my Order dated November 20, 1974).

139. A&P nevertheless contends "there is ample evidence in the record to calculate the costs that the Borden Company could have anticipated if A&P accepted the significantly reduced delivery service which was an explicit condition of the private label price proposal". It argues that delivery costs can be calculated using the official Wisconsin Manual. It contends that Wisconsin is within the same region of the Borden Company as the Chicago metropolitan area and that operating conditions within the region will be roughly comparable.

140. The so-called Wisconsin Studies are RAPX 9. Dr. Solverson testified on behalf of complaint counsel in June 1973. The thrust of his testimony was to the effect that a differential in delivery times per unit for different types of delivery services narrowed as quantities per delivery increased. In cross-examination, counsel for A&P offered several exhibits purporting to contradict Dr. Solverson's testimony and these were received in evidence (RAPX 8 through 15). As I noted in my order dated November 22, 1974, these were received in evidence for impeachment purposes.

141. A&P argues that Dr. Solverson testified that the time requirements for effecting full and limited service deliveries in Chicago would be the same as full service in Milwaukee (Solverson, Tr. 1556). I do not so read his testimony. Rather, it appears that Dr. Solverson was speaking of a pattern or relationship between modified drop and full service in delivery time savings and that it was this pattern of decreasing delivery time savings when volume goes up that is true for a large number of geographical areas. He did not testify that time standards from the Wisconsin Manual or his thesis were applicable anywhere else. Indeed, the Wisconsin Manual and Dr. Solverson's thesis were admitted to show disparities between the two. Moreover, his thesis contained time observations from one additional company not included in the Manual figures (Solverson, Tr. 1601-1602, 1604-1605). There were also differences in the definitions of the various service terms as between this company and those developed in the Wisconsin Manual (Solverson, Tr. 1606). Thus, RAPX 9 shows that one of the functions performed under full service in Wisconsin was stamping merchandise, a service that was not part of full service in Chicago (Pergler, Tr. 5651-5654; RAPX 9, p. 2; RAPX 35).

142. It is, therefore, inappropriate to attempt to establish time standards from RAPX 9. It fails to be precisely applicable to the State of Wisconsin, let alone the Borden experience in the Chicago market area. Even Havemeyer admitted that there were very substantial differences in both the fixed time per stop and the variable time per case as between his New Jersey Study and his Bowman Dairy Study (Havemeyer, Tr. 8183-8187). Thus, even considering RAPX 8 through 15 as not merely admitted for impeachment purposes, they constitute insufficient basis for a determination of Borden's cost in the Chicago area for the periods of time involved in this proceeding.

143. Nor does it appear appropriate to consider a cost justification defense on the basis of standardized costs. We are involved in actual costs, not what the costs should have been. As Havemeyer reported to the Virginia Milk Commission on a study conducted in that state:

> The cost of the three principal functions -- plant processing, distribution and in-store handling -- are independent. That is, a low cost processor could be either a low or high cost distributor; so, also, could a high cost processor. The costs of each of these functions are independent of those incurred by the customers (stores) to which merchandise is delivered. (RAPX 245A, p. II-4).

Following this rationale, it is obvious that a particular dairy such as Borden may be a low cost processor but a high cost distributor or vice versa. Standards would arrive at an average or a mean and would not necessarily be descriptive of any particular dairy without some evidence to associate the activities of such a dairy with the average dairy, which evidence is lacking here.

144. Even if Havemeyer's computations re service-times were acceptable, his calculations re delivery costs appear to be unreliable for other reasons. Some of the activities were improperly computed on a time basis. Thus, Havemeyer allocated driver commissions on a time basis rather than to the volume the driver delivers. But commissions were earned and paid on the basis of volume delivered (Pergler, Tr. 5731-5732; Banaski, Tr. 9560; CX 119J-K; CX 298H-J; CX 299H-K; CX 300H-J). Pergler testified:

> The commission that the routemen received was based on their sales not on the time that they put in at an individual store on an entire route.

Banaski testified that wholesale drivers were paid both a salary and a commission. The union contracts specified that the salary is determined on a hourly, daily or weekly basis but that the commission is based on the number of points delivered. Havemeyer's calculations result in a higher cost for such activity performed for non-A&P customers and inasmuch as this is apparently incorrect, Borden's cost saving on this function in connection with private label sales to A&P is improper (Lemberg, Tr. 9405, 9408). Similarly, Havemeyer allocated total building expense to the wholesale delivery function and on the basis of the time spent at the store by the deliveryman. In the first place, since all four sales categories were involved -- wholesale, bulk wholesale, vendor and retail -- only a part of the total building expense should have been allocated to wholesale. Moreover, such expense has no apparent relationship to the time spent at the store by the deliveryman but to the function involved such as loading, storage, etc. (Lemberg, Tr. 9409-9412). Again, Havemeyer allocated the automotive expense of the delivery trucks according to the time spent serving this store by the deliveryman. The proper approach would be to allocate such costs to the products carried since the trucks are used merely to transport the products to the stores (Lemberg, Tr. 9408-9409, 9447, 9451).

ii. Processing Costs

145. But even independent of delivery costs, Havemeyer's calculations are not persuasive. Arguing that Malone's costs as shown on CX 54B are unreliable, Havemeyer calculated Woodstock processing costs by multiplying the unit cost experienced by Borden at its two Wisconsin dairies (the so-called Milwaukee operation) by the units produced at Woodstock, arriving at the total expense that Woodstock would have incurred in producing each product had it experienced Milwaukee unit costs (RAPX 232, pp. 10-12, 21). He then adjusted the costs to reflect the fact that Woodstock's labor costs were higher than Wisconsin's while its non-labor costs were lower (Havemeyer, Tr. 6990, 6998-6999). This approach does not, however, appear to be reliable. We are not here concerned with the processing costs in Wisconsin but in Borden's Woodstock, Illinois plant. Moreover, we are concerned with the period of May 1965 rather than August 1964, the month used by Havemeyer. There is no record substantiation for the propriety of comparing the two. Havemeyer was not shown to be familiar with either of the Wisconsin plants at the time in question and, in fact, was not familiar with the operations of the Woodstock plant. One of the two Wisconsin plants used by Havemeyer was inadequately identified although the calculations of that unidentified plant appeared to be in some respects

referrable to Woodstock. There was no evidential showing that the Woodstock and the Wisconsin plants had similar product lines, similar labor forces, similar equipment, similar utilization of that equipment, similar management problems, similar volume ratios among the product lines, similar filling machines, similar efficiencies, etc. (Tr. 8100-8111). Moreover, Malone was one of the Borden officials who submitted this study upon which Havemeyer relies. Malone stated, however, that "there is no relationship between the Chicago factors and the Wisconsin factors" (Malone DTR p. 36).

iii. Havemeyer's Unfamiliarity

146. Havemeyer's lack of familiarity with Borden's activities also diminshes the value of his calculations concerning rental costs of the Ex-Cell-O machine, which is a filling machine. The allocation of this cost was originally made in accordance with a formula which, however, was rejected for failure to submit substantiating evidence (Tr. 7397, 7402, 7393). Havemeyer then submitted an alternate method of allocating these costs (RAPX 154; Tr. 8114-9118). He testified, however, that his original method was superior (Tr. 8117) because the alternative was "of an averaging nature". Moreover, since the rental consists of 2 parts - a base rental and a production rental - (Tr. 8131-8132, 8133) and the base rental was paid on a monthly basis but the production rental may have been on a quarterly basis or some other basis other than monthly, we cannot be sure that all machine rental costs are shown in Havemeyer's calculations. His lack of familiarity with Borden's operations makes it impossible for him to supply such information. Malone's informed allocation of this cost in CX 54B and RAPX 65 must be considered superior to Havemeyer's averaging method.

147. There were a number of other areas in which Havemeyer's calculations of cost would not be as reliable as Malone's calculations when one takes into consideration Havemeyer's lack of familiarity with Borden's operations compared to Malone's intimate knowledge of such operations. Thus, in connection with trailer loading expense, Havemeyer discredits Malone's computation where Malone allocated the same expense to gallon glass containers as he allocated to paper gallons (Tr. 8160-8161). Although there were more paper gallons in a case than there were glass, there were also more cases of glass gallons on a pallet (Pergler, Tr. 5632) and there may have been other economies involved

in loading the glass gallon pallets of which Malone was aware but of which Havemeyer could not have been aware.

148. A similar difficulty arises in connection with truck loading expense. There Havemeyer attempted to make a determination of the average points of each product that would be contained in a loaded case relying on his experience of normal practice in the dairy industry (Havemeyer, Tr. 7010-7011). Since, however, he was not familiar with Borden's practices, his computations are not necessarily indicative of Borden's experiences without a determination that such experiences were the normal in the dairy industry. In addition, Havemeyer calculated such costs in contradictory ways. In connection with loading costs in the Chicago area, he included total purchases by the unfavored competitors (the 11 items involved in the A&P private label agreement with Borden and all other Borden dairy products purchased by such stores). In the Indiana study, he considered only the private label items and private label equivalents (RAPX 233, 234). In the latter study, the loading costs were virtually identical. Since this matter involves discrimination on private label items only, the latter study was the only proper approach and would eliminate much, if not all, of the cost differential in this function.

149. Havemeyer's expertise is insufficient to remedy other apparent irregularities of his calculations. Havemeyer attempted to calculate product waste cost but in contradictory ways. He admitted that leakers and product spoiling within date would be product waste (Tr. 7749). He added, however, that this would be a very small part of the product waste which included a privilege to return out-of-date merchandise that was not defective. Consequently, in his profitability study (RAPX 232) he allocated 5 percent of "other delivery costs" to A&P private label (Tr. 7753). In his studies of O'Hare costs (RAPX 233) and Hammond (RAPX 234) Havemeyer took the position that leakers and product spoiling within date are not product waste but were accounted for in some other manner in Borden's bookkeeping system (Tr. 8490). He was unable, however, to cite any record evidence for that statement or from whom that information was obtained. Moreover, there is serious doubt that leakers and product spoiling within date would be only a small portion of the route returns. Competing retail grocers generally testified that they had very few returns (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). Minard

testified that what returns his company did have were usually leakers or product spoiling within date. Havemeyer himself indicated that Borden probably experienced a high number of gallon leakers in this period due to the fact that the paper packaging equipment frequently had problems during this period (Tr. 8101).

iv. Indiana Irregularities

150. Another apparent irregularity in Havemeyer's calculations concerns Valparaiso sales where he used RAPX 81 and 87 as the source for cost data on the assumption that Mr. Marquardt, (the independent distributor who delivered in Valparaiso for Borden) picked up his milk at the Hammond dock. He was unable to substantiate his position by documentation (Tr. 8641). Marquardt himself never testified as to where he picked up his milk (Marquardt, Tr. 1315-1331). Record evidence associates Valparaiso more closely to South Bend than to Hammond (CX 17K; CX 62I). There is, therefore, insufficient justification for the use of RAPX 81 and 87. But even if there were, the expenses thereon are Borden's expenses dealing with vendors, not with stores served by vendors who sold on their own terms (Marquardt, Tr. 1323).

151. A&P argues that Havemeyer should be permitted to apply Hammond branch costs for vendors for his analysis in Valparaiso. It bases its argument simply on the additional cost it would have to sustain to make still another study for this single comparison. But that is not the point. A correct study should have been made in the first instance. Havemeyer's cost studies' deficiencies render his conclusion unpersuasive.

152. The Valparaiso study is also misleading. It attempts to calculate Borden's costs in its dealing with Marquardt who was an independent distributor. Borden's records, therefore, show its expenses of dealing with such independent distributor and not of its dealings with the distributors' customers with whom it had no relationship. Accordingly, if Havemeyer were to apply Valparaiso's expenses to stores served by those vendors, all or part of those expenses whould have to be shown as applicable in that way. This has not been done. Some of the expense allocated to the non-A&P store in Valparaiso, (Tittle) is made up of "provision-bad loans".

Any bad loans, however, made by Borden to its vendors would not be attributable to the stores to whom these vendors deliver, inasmuch as the Borden customer involved in the vendor account is the vendor and not the vendor's customer, a result reinforced by the fact that Tittle received no loan from Borden (Minard, Tr. 3223-3224). Nor can selling expense be ascribed to the Tittle store inasmuch as Valparaiso is not on a Borden route, Borden salesmen did not visit Tittle's store there (Minard, Tr. 3207-3208) and Tittle was not even a customer of the vendor which delivered to it (Marquardt, Tr. 1317). Similarly, there is no basis for allocating credit and collection costs to the Tittle store for the additional reason that it was not responsible for any credit loss (Minard, Tr. 3157). Tittle did not pay through a distributor (Marquardt, Tr. 1317). Borden's provision for bad accounts with milk distributors could not be applicable to Tittle. Further, since Tittle was never overdue (Minard, Tr. 3157) there could be no interest on overdue account.

v. Branch Selling Expense

153. Havemeyer's calculations in connection with branch selling expense - the expense related to the activities of Borden's salesmen - are also questionable. In this connection he estimated the number of points sold to independent stores, thus eliminating A&P sales and sales to schools and other non-store customers from consideration, and arrived at a branch selling expense per independent store point (RAPX 233, pp. 23, 16; Tr. 8492-8494). Such allocation was based on the assumption that the entire time of the salesman was spent in soliciting these particular store accounts and serving these accounts. But Mr. Daube, a Borden executive, testified that the salesmen "contacted new customers. ... [h]is basic function was to develop and obtain new business for the company" (Daube, Tr. 9226-9227). Such missionary work is part of the selling expense of doing business on the part of Borden and it should be borne equally by all customers, A&P as well, on a volume basis (Lemberg, Tr. 9419-9420). Moreover, there is no record evidence to justify Havemeyer's elimination of non-store customers but only his belief that Borden would have special bulk wholesale salesmen who would call on bulk customers. He admitted, however, that there is nothing in the Borden expense account that shows that the salesmen do not call on non-store customers who are served by the wholesale routes (Tr. 8496-8497). In addition, the Borden-A&P contract provided that "Borden's salesmen's services will be supplied at the store level only, to follow

through on a complaint covering such matters as service, product or container" (CX 62Q). But no time has been computed by Havemeyer for such activities. The absurdity of this conclusion is demonstrated by the amount allocable to Jim's Groceries where Borden's salesmen visited maybe once a week or maybe once a month (Cox, Tr. 3992). But Havemeyer's allocations would run about $165 for March 1966 (RAPX 233, pp. 23, 31). Nor did Havemeyer give any consideration to the fact that Borden incurred some selling expense in connection with the functions of Tarr and the salesmen who assisted him in servicing the A&P account (Tr. 8503). Yet Tarr spent almost all of his time in serving the A&P account (Tarr, Tr. 845-846, 897, 899). Finally, Havemeyer's approach on this function contradicts the treatment in his profitability study where he allocated some selling expense to A&P private label.

vi. Failure of Classification

154. Havemeyer's cost calculations are also flawed by his failure to classify customers in accordance with size, type of store, volume of purchases and other characteristics. In his profitability study he treated all independent stores as having one set of characteristics and A&P stores as having another. Thus, in RAPX 232 p. 89, he established various volume brackets for "other stores" but made no volume analysis for the A&P sales, despite the fact that 10 of the 88 A&P stores listed in the March 1965 breakdown of O'Hare sales took less than 300 points per delivery (RAPX 74). In calculating the number of points per case in May 1965, for all "other stores" Havemeyer examined the route books for 3 out of 17 routes in March 1966 and admitted that "there was not sufficient data to be certain of a variation of the points per case by size of store" (Tr. 7845). While admitting that it was highly unlikely these various size stores purchased the same number of points per case, he explained that "the data was not there unless you went through a tremendous analysis" (Tr. 7850). His resulting figure of 22 points per case for "other stores" is obviously quite arbitrary. Similarly, in connection with RAPX 233 and 234, Havemeyer gave no recognition to different classes of customers with different cost experiences in connection with his allocations of delivery expense, clerical expense, product waste, selling expense, etc.

155. This failure of classification is hard to understand in view of Havemeyer's prior experience. The one

prior Robinson-Patman type cost study made by him was for Bowman Dairy in the case of U.S. v. Borden, 370 U.S. 460 (1962). His study was rejected by the Court at 471:

> In the [Bowman] study the experts charged all independents and no chain store with these costs. Yet it was not shown that all independents received these services daily or even on some lesser basis. Bowman's study indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility and the burden has not been met here.

There can be no doubt that there are vast differences between the characteristics of the various customers on Borden's routes, differences in physical size, layout of stores, purchase volume, services received and so on. Even the A&P stores had such differences. Havemeyer's studies here merely repeat the error made in his earlier Bowman study.

156. In the O'Hare and Hammond studies Havemeyer determined costs on an average basis for A&P stores and then compared this average with specific competitors. Thus, in his delivery cost analysis in RAPX 232, he proceeded on the basis that A&P was one single customer. This was condemned, however, by the Commission in National Dairy Products Corp., 70 FTC 79, 193-196, 207 (1966). The Commission stated:

> The Hearing Examiner rejected respondent's cost justification defense, in part, for the reason that discounts to multi-unit purchasers must be cost justified on a store-by-store basis. We agree ... the averaging of purchases has no relationship to the cost actually incurred in dealing with each store (at p. 194).
> Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of

> the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain... In practice therefore respondent takes the over-cost justification in delivery to the large stores of a chain and credits this time saved to the smaller stores. In our view this is not a valid costing procedure under the Robinson-Patman Act (at pp. 194-195).

Yet this is exactly what has been done here. A&P stores in the Hammond area range from a low of only 17 plus cases per delivery to a high of 52 plus cases per delivery (RAPX 234, p. 19). Thus, although Burger's Market took more than 78 cases per delivery, the competing A&P store #325 took only 17.68 cases per delivery but this small A&P store was averaged out with larger A&P stores to hide the fact that there was such a hugh disparity in size and purchase volume. Of course, by such averaging out, the fixed costs applicable to this store's operation become much less than they would be had the true volume been known since fixed costs are usually allocated on the basis of volume.

vii. Countervailing Costs

157. Nor did Havemeyer give adequate consideration to countervailing costs - costs necessary for the A&P business but not for other business. Reference has already been made to Havemeyer's failure to consider the expense of Tarr, the Borden employee whose activities were in great measure devoted to the A&P account. But Minkler, Malone, Gose and others in Borden's Chicago office also spent a very great amount of their time in getting and keeping the A&P private label business (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone DTR pp. 29-204); some of Borden's home office personnel in New York spent considerable time on that same account (Archer, Tr. 1209-1212, 1228, 1230) but Havemeyer made no special study of these expenses (Tr. 7757-7758, 9699-9710).

158. Moreover, it was often necessary to mix A&P label and Borden label products together on a pallet to make up a full pallet for an A&P store (Pergler, Tr. 5697-5698, 5700, 5702-5704). This mixing had to be done by hand

which would involve extra effort and expense which was, however, ignored by Havemeyer who stated that the mixing of products on pallets was done equally for everyone. But Havemeyer has not personally observed this procedure (Tr. 7980), and Pergler's testimony relates primarily to the A&P deliveries.

159. There may have been additional costs for A&P stores involved in connection with clerical expense. Thus, there was a daily delivery ticket for each individual store and a summary billing sheet for a number of stores in an area (Tr. 8484-8485).. This additional summarization was not considered by Havemeyer (Tr. 8478-8486, 7716-7730). In addition, Borden had to include the retail price and extend the retail value for each product on a total basis at A&P's request (RAPX 170, pp. 87-91; A&P Adm. March 12, 1973, p. 2, second par.). Despite this indication of countervailing costs Havemeyer made no study of the effect without which a true cost difference could not be ascertained (Lemberg, Tr. 9421-9422).

160. Furthermore, Havemeyer determined the clerical expense for A&P private label on the basis of the fact that private label represented 11/38's of the number of lines on a summary billing to A&P (RAPX 233, p. 11; Tr. 8478-8479). This ignores the fact that an A&P billing had 38 lines but the competitor's stores billing had at the most 27, the difference, 11, being the 11 private label items which A&P was purchasing but not the competitor stores. Thus, it would appear that clerical costs should have been determined by comparing the number of lines on the billings required for the two different stores which would result in a higher clerical cost in this connection for A&P stores than for the competing stores. In effect, A&P's purchases involved clerical expense in connection with the billing of the private label items, an expense which was not incurred by the competing stores which did not buy any private label items.

viii. General Selling and Administrative Costs

161. Havemeyer's calculations concerning general selling and administrative expense is also questionable. He first ascertained the "overhead cost" which he had selected from Borden's central office accounts (RAPX 233, pp. 5, 6). He then took the sum total of all other functional expenses which he had allocated to O'Hare customers, divided this total into the overhead cost, arrived at a resulting percentage figure and applied the percentage figure to the

total costs for the other seven functions which he had calculated for the O'Hare customers. These seven branch functions, however, did not include production or transportation costs which, according to Havemeyer, totaled about $270,000 in May 1965 (RAPX 232, pp. 24, 33, 39), whereas the branch expenses in March 1966 were calculated as being about $82,000 (RAPX 233, p. 6). It is only reasonable to assume that the central office would be concerned with the totality of Borden's operation and would spend some time concerning itself with production and transportation costs but none of such costs have been considered in this connection by Havemeyer. Instead, a very substantial amount of the overhead expense is allocated on the basis of the time the driver spends at the individual store since delivery expense is allocated on this basis. Thus, Jim's Groceries was a daily cash basis customer (RAPX 233, p. 69). His monthly purchase volume would be about 10,000 points (RAPX 233, p. 31) and Havemeyer would have this customer credited with having generated about $41 in expense for the Borden home office staff in March 1966 (RAPX 233, p. 41). Yet it is hardly likely that the home office would have any contact with Jim's Groceries. Similar results would apparently be reached for other cash customers (RAPX 233, pp. 60-63, 66, 69).

ix. Credit Loss

162. Still another questionable area with respect to Havemeyer's calculations arises in his treatment of credit loss. Havemeyer estimated the amount related to the wholesale business and allocated it equally per point among the 17 independent store purchasers on the Hammond wholesale routes. The "milk regular" account by Borden included both wholesale routes and retail home delivery routes (Tr. 8818-8819), Havemeyer allocated 12 percent of the expense to retail home delivery customers and 88 percent to wholesale customers (Tr. 8818), but admitted that if done a volume basis retail sales would account for about 25 percent (Tr. 8819). Havemeyer admits that this is a "bad account" expense record (Tr. 8826-8828; RAPX 234, p. 90) and there are substantial amounts attributed to "legal expense" and "interest overdue accounts". It would appear, therefore, that this account is primarily related to particular customers who are in arrears. With the exception of Wallies, all the independents had been extended credit for a maximum of 4 weeks (comparing the average weekly sales figure with the largest balance shown for each store). This would hardly constitute a bad account nor was it so regarded by Borden who continued to grant rebates to these stores (CX 288-289; CX 188, 191, 194-197, 200, 202). There was then

no reason to allocate that account's expenses to customers who had not contributed to such expense and if A&P was not so charged there was no reason for charging the independents, some of whom may have been as financially sound, if not more so, than A&P (CX 189, 192, 199, 203, in camera; CX 216-219, 221).

x. Advertising Expense

163. Still another area of doubt involves advertising expense. Four products were involved in this advertising (RAPX 90, p. 3) only one of which was involved in the Borden-A&P private label agreement (Bitting, Tr. 9334). Two of the other three products were sold only under the Borden label and the fourth item was not sold to any of the store customers in this area (Bitting, Tr. 9335). The one pertinent item represented only some $3,000 out of a total expenditure for all four of $114,000. Although Havemeyer argues that these advertisements are really advertisements of the entire line of Borden products, not just the named product, it was shown that each of the products involved was a new product which was being introduced and Havemeyer did not know what was said in any of the advertisements (Tr. 9638-9655). Without such information there is no basis for assuming that the advertisements referred to more than the four products named. Even if such advertising represented institutional advertising the expense should be applied to all sales including those of private label since it represented a general expense of doing business and expanding sales (Lemberg, Tr. 9419-9420).

xi. The Availability Argument

164. Finally, A&P contends that complaint counsel seem to argue that even if Borden's prices to A&P were cost justified, A&P does not have a defense unless it can be also shown that those prices were offered on some kind of proportional basis to others. It bases this construction of complaint counsel's arguments on complaint counsel's language to the effect that the cost difference in this case is not due to differing methods or quantities of sale or delivery, which is a requirement under Section 2a of the Robinson-Patman Act, but the difference in availability, i.e., that Borden offered all stores the same type of service spelled out in the Borden-A&P private label contract, but at

a much higher price (CX 138; CX 62P-Q). Indeed, I have found that virtually the same service was offered by Borden to its non-A&P store customers (provided they had a certain volume of purchases) but at a maximum discount from list prices of not more than 30 percent compared to A&P's effective discount of more than 35 percent. A&P's logic would require competitors to accept the same service program at much less discount in order to preserve their rights under the Robinson-Patman Act, even if this meant compounding their loss or disadvantage by requiring them to incur more in-store service cost as the result of reduced service from Borden, without an adequate discount to compensate them for it. As complaint counsel view this argument

> a buyer may legally discriminate in price if he wraps up the price package in service terms and offers the same service to others at a much higher, unattractive price, which the competitors cannot accept. The difference in service terms will then justify the price difference (complaint counsel's Proposed Findings, Vol. II, p. 299).

Such an obvious flout of the Robinson-Patman Act cannot be tolerated. Non-A&P stores were offered the same service terms enjoyed by A&P but were required to pay more. There was, however, no difference in Borden's cost savings as between the A&P stores and non-A&P stores receiving the same services. It follows, therefore, that no price differences could be justified thereby. It may be argued that the non-A&P stores did not take the limited service that A&P had and that, therefore, Borden actually experienced cost savings in its dealings with A&P that it did not experience in its dealings with the non-A&P stores. But Borden's preferential discounts were not "functionally available" to the non-favored customers who had to meet certain minimum volume purchases which A&P did not (Morton Salt Co., 334 U.S. 37, 42 (1948)). It appears only proper to make cost comparisons in a seller's dealings with competing purchasers where such dealings are comparable and functionally available. The Act recognizes the need for like grade and quality of items sold. Certainly the same conditions of sale must exist before cost comparisons can be made. With the same conditions of sale offered all purchasers, no differences in costs could arise. A&P's inducement of a preferential price under such circumstances would violate the Act, particularly where, as here, the buyer knows that the price its competitors are obliged to pay for their purchases is one which it, the buyer, refused to pay and succeeded in forcing the seller to reduce to that preferential level.

xii. Conclusion

165. I conclude, therefore, that A&P's cost justification studies, RAPX 232, 233 and 234, are so defective and inadequate as to furnish no evidentiary basis for justifying A&P's preferential price for private label items on the basis of Borden's savings in costs.

VI. The "Borden Defense"

166. A&P argues that since Borden "admittedly" has a defense to a Section 2(a) charge by reason of meeting competition, and complaint counsel have not charged it with a violation, A&P cannot be guilty of violating Section 2(f). It should be noted, however, that Borden has not been adjudged to have a defense to a Section 2(a) charge by reason of meeting competition. Borden simply has not been charged by the Commission which has such discretion in issuing complaints. It cannot be said with certainty that, had Borden been charged with a 2(a) violation, it would have been able to defend such a charge successfully. It has been held that a seller cannot accept a buyer's story (such as one about a competitive offer) without more (National Dairy v. FTC, 395 F.2d 517, 528, (1968) where the court distinguished decisions in Forster Manufacturing Co. v. FTC, 335 F.2d 47, 54 (1964), Beatrice Food Co., Inc., 68 FTC 286, 350 (1965) and Continental Baking Co., 63 FTC 2071, 2164 (1963) in which efforts to verify were found). But even had Borden been able to defend such a charge successfully, the result would nevertheless be insufficient to exonerate A&P under the circumstances. Thus, in the Kroger case the supplier, Beatrice, was found to have not violated 2(a) of the Act. Nevertheless, Kroger, the buyer, was found to have violated 2(f) of the Act:

> Kroger [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of Section 2(f) without there being one under Section 2(a). While ordinarily this may be true - a matter we need not pass upon - it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid (438 F.2d at 1374).

Here, too, A&P gave false price information to Borden as to Bowman's competing bid. Although A&P argues that Kroger actively misrepresented the other bid but that A&P had a lower bid from Bowman, the fact remains that A&P represented to Borden that it had a bid which could be compared to Borden when, as a matter of fact, it did not, in view of the volume conditions and delivery conditions. Even if those differences could be ignored and the two bids compared, A&P represented to Borden that Bowman's bid was lower than Borden's when, as a matter of fact, A&P itself understood Bowman's bid to be higher than Borden's.

VII. *Commerce and By-Products*

167. A&P cites the provisions of the Robinson-Patman Act which make it unlawful

> ... for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved with such discrimination are in commerce ...

It is not sufficient that the parties be engaged in commerce, the purchases involved in such discrimination must be in commerce. A&P's purchases from Borden were under a contract which covered sales and deliveries not only to its stores in Illinois where Borden's Woodstock plant was located but sales and deliveries to its stores in Indiana and elsewhere as well. It was not severable. The contract, therefore, covered purchases in commerce because it was multi-state in nature.

168. Moreover, Borden's supply of raw milk came from outside the state of Illinois and its processing into milk products did not interrupt the interstate flow of milk from farm to retailer. *Foremost Dairies, Inc.* 62 FTC 1344 (1963) *aff'd.* 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Dean Milk Co.* 68 FTC 710 (1965), *aff'd.* 395 F.2d 696 (7th Cir. 1968).

169. A&P argues that certain of the milk products were so processed as to make them separate and distinct commodities, thus breaking the interstate flow. It refers to products such as whipped cream, sour cream, eggnog, and onion dip, which allegedly were so physically,

biologically and chemically different from raw milk that the interstate flow of commerce was terminated at Borden's processing plant in Illinois. Nevertheless, those products were a relatively insignificant part of the contract entered into which was not severable. Whole milk constituted the great bulk of the sales under the contract and did not interrupt the interstate flow from the raw milk supply to the retailer. There is no basis for splitting the contract where the parties have not done so. To allow these insignificant products to control the legality of private label purchases under such an indivisible contract would have the tail wag the dog.

C. Count III

170. Count III of the complaint alleges that A&P sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products in spite of A&P's lower cost for the private label milk, thus maintaining the existing retail prices for milk and other dairy products. Borden for its part failed to pass on at the wholesale level price reductions similar to the reductions granted to A&P to other purchasers who compete with A&P. Respondents' course of conduct, it is alleged, constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

171. The area involved for purposes of proof of this Count is the Chicago Standard Consolidated Area (SCA) consisting of the counties of Cooke, DuPage, Kane, Lake, McHenry and Will in the State of Illinois and the counties of Lake and Porter in Indiana.

172. A&P ranked third in total sales among the retail grocery chains operating in the Chicago area, its sales in 1965 amounting to 203 million dollars (CX 222A). It was a significant factor in the market and its competitors were careful to monitor A&P's prices (Lasorso, Tr. 2646; Cox, Tr. 3947-3948, 3986; Barney, Tr. 3686; Minard, Tr. 3147, 3152, 3153). Had A&P created a price differential on its private label milk, Scott Lad (a competing grocery) would have had to meet the lower price (Schaub, Tr. 3330).

173. Borden ranked either second or third in Class I milk sales among the dairy companies operating in the Chicago area. It was an important market factor (Holin, Tr. 2965-2966, 2982-2987; Soldwedel, Tr. 3373-3374; Hitchner, Tr. 3596). Prior to the private label agreement Borden

was A&P's principal milk supplier for its Chicago unit and provided approximately 95 percent of A&P's milk supplies (Schmidt, Tr. 1678).

174. A&P and Borden competed with one another in the sale of milk and milk products at retail but the record in this proceeding does not establish clearly the dates of such retail deliveries by Borden nor the extent. Witnesses referred to Borden's retail sales as having lessened and ceased somewhere between 1963 and 1968. Thus, Borden's Gose testified that Borden had "some" retail routes when he left Borden's employ in 1968, but he added "I don't remember exactly, but we had considerably less..." (Tr. 1041). Later, however, Gose said that retail home deliveries were phased out "somewhere" between 1963 and 1968 (Tr. 1113). The President of Wanzer Dairy testified that Borden "could have had 21 or 22 routes...which means nothing in retail" (Soldwedel, Tr. 3406). The record does not establish with any degree of certainty that meaningful horizontal competition between A&P and Borden at the retail level existed at the time critical to this proceeding, 1965-1968.

175. Borden competed indirectly with A&P at retail by selling at wholesale its Borden brand milk to non-A&P stores competing with A&P at retail (Kuhlman, Tr. 5273). If A&P were to reduce its retail price competing retailers might be forced to lower their price of the Borden label products and seek cost reductions from Borden.

176. A&P had strong motivation to stabilize and maintain prices on milk and milk products. As noted earlier, as the result of its private label agreement with Borden there was an expectation on the part of A&P to realize an estimated annual saving of approximately 820 thousand dollars. This saving could be realized only if A&P's profit margin was protected by the maintenance of the retail price (Kuhlman, Tr. 5230). A reduction of A&P's retail price would necessarily lower its net savings unless Borden reduced its price to A&P even further. This A&P could not expect. It had no better competitive bids and there was always the realization that there was some point beyond which Borden could not possibly recede despite its need for volume. A&P was also anxious that Borden not grant others the same lower price A&P enjoyed since if this were done, the A&P competitor might lower his retail out-of-store price and A&P might have been obliged to meet such lower price by reducing its retail price, thus losing some of the expected savings.

177. Borden similarly had strong motivation to maintain milk prices. Its newly completed processing plant at Woodstock, Illinois, had a very large capacity and A&P's Chicago Metropolitan Region alone accounted for over 55 percent of Borden's wholesale sales volume (CX 42D). If Borden was to maintain an efficient level of production at Woodstock it had to retain the A&P business (Minkler, Tr. 217; Kuhlman, Tr. 5230). A break in milk prices if A&P would reduce its out-of-store private label prices would harm Borden seriously:

> We have said all this before many times, but, we do hope A&P will price this private label and the advertised brand label the same, certainly to begin with. If private label out-of-store is dropped to reflect this 1¢ per point, this market will rock immediately, we think. We believe such a move on their part would destroy the present price level for advertised brands and would add explosive fuel to a war over the differential question. We know some competitors will be strongly opposed to a difference in price for a private label. One big decision we have to make has to do with how low we will go to force acceptance of a differential. We folded up in Wisconsin because of a "no sales below cost" stipulation in the Wisconsin Law. We have no such "out" in Illinois.
>
> This is not exclusively a matter in our interest. We believe retailer's margins would eventually get caught in whatever upheaval takes place. With such a move on A&P's part - instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing in private label and, certainly, we will have been knocked to our knees. (CX 7B)

178. In the Wisconsin situation referred to above, Borden was supplying milk to the Kroger stores both under the Borden brand and two secondary labels but at a lower price to Kroger for the milk products under the secondary labels. Kroger then lowered the retail price on these secondary labels which resulted in a chain reaction of price breaks in the prices of other dairies and chains forcing Borden to lower both its wholesale and retail prices on Borden label (Soberg, Tr. 2753-2756, 2759). A&P was also involved in this price war (Soberg, Tr. 2764-2765).

I - Complaint Counsel's Contentions

179. Complaint counsel contend that to stabilize and maintain the price of milk in Chicago

> "all that was necessary in light of the market structure was for each party to agree or to arrange to assure the other that neither would do anything which would tend to disrupt the Chicago market or any milk prices therein. The agreement and/or arrangement of mutual assurances were comprised of and/or were supported by, inter alia, respondents' communications with one another, their exchanges of information, and their market knowledge and market conduct." (Complaint Counsel's Proposed Findings, Vol. I, p. 225)

180. With respect to respondents' communications with one another, complaint counsel cite record evidence indicating some discussion of market sensitivity between them. Thus, on February 9, 1965, Borden's Minkler wrote to Borden's Pentz about a conversation between A&P's Schmidt and Borden's Tarr:

> [W]hen Schmidt talked to Tarr yesterday he made it very plain that we had to be right. He said he very much appreciated the sensitiveness of this market and that he did not want to put this private label out for bids (CX 12).

Nor did Borden want this business put out for bids. As noted earlier in Minkler's internal letter (CX 7A, B) Borden was concerned about a "market upheaval" as result of private label bids and believed that "retailers' margins would eventually get caught in whatever upheaval takes place...their dairy department spread could collapse...we will be knocked to our knees."

181. Complaint counsel also cite the meeting between A&P and Borden officials on or about May 26, 1965. Schmidt expressed a hope that the private label program might be productive of 500 thousand dollars annually. CX 19F states:

> In this regard, it was stressed that this type of product contribution could only result from the continuance of present out-of-store margins on fluid milk products

and referred to the Wisconsin price war. Complaint counsel contend that this comment, taken together with the discussion which took place concerning Borden's narrow profit margins, "was clear warning that A&P should not reduce the retail price on private label milk" (Complaint Counsel's Proposed Findings, Vol. I, p. 227). It should be noted, however, that CX 19F does not indicate whether it was Borden or A&P which "stressed" the continuation of present margins.

182. Complaint counsel also cite the language of Borden in its price quotation to A&P in May 1965 (CX 18P). In it Borden says:

> In certain areas the primary basic price has recognized the depressed competitive situation prevailing in such markets. Such situations must eventually be corrected. It is considered that any economic improvement that occurs subsequently will be mutually recognized in accordance with the situations.

Complaint counsel's economic expert, Dr. Kuhlman, contends that the parties were discussing prices in the retail market (Kuhlman, Tr. 5232-5233, 5308-5309). According to Dr. Kuhlman:

> This constitutes in my mind a very clear and very explicit correspondence regarding the price of milk, and the fact that one of these companies is a supplier of milk to the other one can in no way be used to explain that this is not price fixing (Tr. 5233).

183. Complaint counsel also argue that Borden's right to terminate the private label agreement at any time helped

insure that A&P would not choose to alienate Borden as its supplier by reducing the retail price (Kuhlman, Tr. 5234).

184. Complaint counsel also cite the fact that the 820 thousand dollar annual saving offered by Borden to A&P under the private label agreement was not made on any straight discount basis but spread across 11 different product lines and argue that Borden influenced A&P's retail price because Borden determined how much of the savings A&P should realize on any individual product (Kuhlman, Tr. 5233-5234).

185. Complaint counsel also argue that A&P must have known that Borden was not prepared to give the same deal to competitors of A&P inasmuch as it had a constant flow of information regarding Borden's costs in connection with the private label pricing (Kuhlman, Tr. 5231). Similarly Borden knew about A&P's retail prices since A&P generally supplied Borden with its retail prices (A&P Adm. dated March 12, 1973, II D, p. 2).

186. Complaint counsel also cite the fact that when the private label program began and thereafter, A&P sold private label milk and dairy products at the prevailing retail price level for vendor label milk and dairy products. Similarly, Borden failed to pass on at the wholesale level price reductions similar to the reductions granted A&P to other purchasers who compete with A&P in the Chicago area, at least for two or three years after the commencement of the private label agreement with A&P (Gose, Tr. 1095-1099).

187. Finally, complaint counsel cite the testimony of Dr. Kuhlman, its expert economic witness, who found a combination between the respondents to stabilize the price of milk (Kuhlman, Tr. 5229-5235). The evidence consisted of "mutual assurances", their post-contract behavior, their spreading of the savings across 11 different product lines and the fact that the agreement was terminable at will.

II - Respondents' Reply

188. It appears, however, that Borden's failure to offer the private label prices it granted to A&P to other customers immediately was because its Chicago sales manager, Gose, was instructed by Borden's law department that Borden could not make such offers to others and still rely on the meeting competition defense of the Robinson-Patman Act (Gose, Tr. 1076). Later, however, when it appeared that

Borden's competitors were selling at prices comparable to its private label prices to A&P, Borden solicited business at such prices (Dischner, Tr. 7165).

189. Respondents also cite the fact that John White was sales manager of A&P's Chicago unit at the time and that it was he who established the out-of-store prices without consultation with Schmidt, Bartels or Smith, whose authority was limited to purchasing the products. White did not know of the Wisconsin experience nor had he had discussions with Minkler, Tarr or Malone and was not involved in the private label negotiations (White, Tr. 2058-2063).

190. With respect to the internal Borden letter of December 28, 1964 (CX 7), Borden notes that Minkler spoke of the effect of an out-of-store differential between private and brand labels but notes that it neither called for nor requested any action and that neither the letter nor its contents were disclosed to A&P.

191. With respect to the "sensitivity of the market" which was brought up during the February 1965 meeting between Tarr and Schmidt, Borden argues that it reflected Tarr's fear that competitors might disregard overhead costs in bidding for A&P's business (Tarr, Tr. 872). Minkler also mentioned this to A&P's Bartels later (Minkler, Tr. 213-214).

192. With respect to the notation in Borden's May 1965 price quotation to the effect that "the primary basic price has recognized the depressed competitive situation prevailing" and "any economic improvement that occurs subsequently will be mutually recognized", Borden contends that this does not refer to prices in the retail market but to the fact that in some areas the prices bid by Borden were not based on Borden's costs due to competitive wholesale situations then existing and would have to be adjusted later to a cost basis. Even if the so-called depressed competitive situation referred to prices in the retail market the critical question is whether the "mutual recognition" to be given to any economic improvement thereafter does not necessarily refer to A&P's out-of-store prices but to acceptance of a higher price from Borden by A&P based upon cost rather than competitive situations. In any event, Schmidt told Tarr thereafter that A&P did not want the depressed market in the outside areas to be given special consideration in the bids but that all prices should be based on costs (RAPX 132A-C).

193. With reference to the May 26, 1965 meeting between A&P and Borden officials where A&P expressed its hope for a saving in the amount of 500 thousand dollars using the private label agreement and it was stressed that that amount could result only from the continuance of present out-of-store margins on fluid milk products (CX 19F), Borden rejects complaint counsel's interpretation of this language as a "clear warning" that A&P should not reduce its retail price. Borden's Malone testified that the statement was made to disabuse A&P of any possible belief that Borden would guarantee those savings and support A&P in a price war (Malone DTR pp.217-218). See also Smith's testimony on rejecting Borden's July bid:

> [W]e didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be our expense instead of Borden's expense (Tr. 1361)

194. With respect to the spread of the savings over 11 different private label items, Borden notes that each item was ordered separately on a demand basis and that a single price for one year's purchases of all 11 items could not therefore be quoted.

195. Borden also disputes complaint counsel's conclusions on the terminable-at-will provisions of the private label agreement, arguing that such contracts are pro-competitive. It notes that the National Stores shifted from Dean Dairy to Hawthorn-Mellody, A&P from Bowman to Borden, Jewel from Borden to Dean, Hillman from Capitol to Wanzer, Wieboldt from Bowman to Wanzer, K-Mart from Beatrice to Borden and Eagle to Borden (Schaub, Tr. 3109; Soldwedel, Tr. 3392; Dischner, Tr. 7170-7175; Douglas, Tr. 3508-3510; Schmidt, Tr. 1765-1766; Gose, Tr. 1102). It also cites Borden's attempt to secure Kroger's milk business in 1965, 1966 and 1968 as well as its proposal to supply Consolidated Food, K-Mart, White Hen, National and Eagle (Gose, Tr. 1089-1102, 1131, 1170; Malone DTR p. 224-226; Markham, Tr. 7041). Moreover, Borden notes the inconsistency in complaint counsel's argument that Borden was dependent on A&P's business for the efficient operation of its Woodstock plant and Borden's situation was so precarious that it was compelled to grant whatever concessions A&P demanded, while at the same time complaint counsel argue that Borden was independent enough to use the terminable-at-will provisions of the contract with A&P to terminate the contract immediately if A&P lowered its retail price on private label milk.

III - Conclusion

196. It is well settled that all combinations having any tendency or effect to tamper with price structure are unlawful. U.S. v. Container Corp, 393 U.S. 333 (1969); Albrecht v. Herald Co., 390 U.S. 145 (1968); U.S. v. Parke-Davis & Co., 363 U.S. 29 (1960). The essence of a combination is the existence of concerted action between the parties, U.S. v. Container Corp., supra. The test is not so much the manner in which the parties combine as that there be a "collaborative element present" Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F.Supp. 945, 951 (S.D. Texas 1972).

197. Complaint counsel cite the decision in Sunny Hill Farms Dairy Co. v. Kraftco Corp. 381 F.Supp. 845 (E.D. Mo. 1974), arguing that the facts there were remarkably similar to this situation. Complaint counsel argue that Sunny Hill was a case in which the supplier, Sealtest, was asked to provide the buyer, Malone & Hyde, with private label milk at a lower cost than Sealtest sold its own brand label to it. Subsequently Sealtest and Malone & Hyde engaged in discussions concerning price wars, depressed markets and limited retail price differentials; the court found an agreement between the defendants to fix prices at both the vertical and horizontal levels. Complaint counsel cite the testimony of one of the witnesses to the effect that Sealtest advised the buyer to guard against getting into a price war by lowering the price of milk. They also cite testimony in the Sunny Hill case to the effect that there was conversation between the defendants about the out-of-store price. Counsel for A&P, however, point out that by order dated July 19, 1974, the Judge in the Sunny Hill case withdrew and vacated his memorandum and dismissed the complaint. Nevertheless, complaint counsel urge the logic of that decision. A&P points out, however, that in Sunny Hill the court found that the defendants were independent and competing suppliers of milk to certain grocery stores which followed the recommendations of Malone & Hyde. Thus, Malone & Hyde had certain limited control over the marketing programs of such stores. The court then found that the "record is replete with evidence indicating that Sealtest and Malone & Hyde agreed upon the into-store prices of their competitive products" and found illegal horizontal price fixing in such agreement between competing milk suppliers, Sealtest and Malone & Hyde. As respects the fixing of out-of-store prices,

the court found that Section 1 of the Sherman Act was violated by a "*commitment* to a common scheme or to some type of joint action ... stated in another fashion the quintessential yardstick for conduct deemed violative Section 1 is whether or not there is a collaborative element present".

The court added:

> An agreement to fix the maximum resale price is also proscribed because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." ... the eclectic criteria that can be gleaned from these cases for the ascertainment of a violation is whether the agreement or conduct interferes with the freedom of sellers or traders in such a manner as to *prohibit or restrain their ability to sell in accordance with their own judgment*, and not what particular effect the agreement or conduct has on the actual prices (Emphasis added).

The court then noted that Malone & Hyde sought a price differential in the two different labels of milk whereas Sealtest was desirous that the two labels be priced the same. The parties, however, finally agreed to a price differential. Thereafter, the court found that there was the necessary implementation to effectuate actual retail price maintenance by Malone & Hyde's control over its affiliates saying "there is direct evidence that *Malone & Hyde dictated the out-of-store price* to its affiliates." The court found in *Sunny Hill* that there was "more than a mere non-biding resale price recommendation but a subtle mode of dictating resale price."

198. Thus, aside from the fact that the Judge in *Sunny Hill* withdrew his memorandum and vacated it, the logic of his earlier position is apparently inapplicable here. Unlike *Sunny Hill*, there was no express or explicit agreement between A&P and Borden concerning A&P's price differential for private label milk. The agreement, instead, was limited to the Borden price to A&P for such private

label milk and the differential in such cost compared to the Borden label cost to A&P. Although there was some discussion of price both in this case as well as in Sunny Hill, there is no reason to assume that the court in Sunny Hill would have reached the same conclusion absent a finding of an express agreement between the parties concerning a price differential on resale.

199. Here Borden as well as A&P had the same objectives in mind: the maintenance of the Borden label level of prices for the private label products. For Borden this was preferable because it avoided the likelihood of a price war in which retailers would seek financial help from Borden, their supplier. For A&P this was also preferable because it maximized their profits on dairy items by lowering the costs of some of them. Under such circumstances had the parties then agreed to the maintenance of such level of prices there would of course, have been a violation of law. There is, however, no evidence in this record which would suggest that Borden ever spoke to A&P about A&P's resale prices on private label items except to note that a differential might create problems. A&P never gave Borden any assurances that it would not create such a differential. The "mutual assurances" on which complaint counsel rests Count III of the complaint are not found in this record. It must be borne in mind that A&P approached Borden about private label milk in an effort to maximize its profits in dairy products by securing the private label at a lower cost. It was only natural, therefore, for A&P as well as for Borden to note the mathematical fact that if A&P lowered its price on private label milk it would not realize the increase in profit that it sought since the demand was inelastic and lowering the price would not increase sales (Markham, Tr. 7038). This realization constitutes no assurance from either party. Similarly, it was an open secret that Borden needed the A&P business or something its equivalent for the efficient operation of its new Woodstock plant. Consequently Borden would go to great lengths to avoid losing such a customer including a reduction in price to a level it felt its competitors might offer in an effort to lure the A&P business away from Borden, that is, to a level which barely covered, if at all, the mere direct costs. Borden's failure to offer similar savings to other chain stores immediately thereafter has been explained and there appears nothing unreasonable in this point of view. In short,

the behavior of the respondents in pricing the private label items was the behavior that one would expect of any rational businessman independently pursuing only his self-interest in markets such as those found in this case. The circumstantial evidence of agreement is equally consistent with a finding of independent action.

> To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions (Pevely Dairy Co. v. United States, 178 F.2d 393 (9th Cir. 1949), cert. denied, 339 U.S. 942 (1950).

See also Virginia-Carolina Peanut Association, 51 FTC 1156, 1188 (1955).

200. A&P's failure to pass on to the consumer its savings on private label milk are not necessarily indicative of any collusion. As complaint counsel's witness Kuhlman put it:

> The non-collusive oligopolist in an industry having a relatively inelastic demand will be unlikely to pass the benefits of cost reduction programs on to the consumer (Kuhlman, Tr. 5312).

201. I conclude, therefore, that complaint counsel have not met their burden of proof to show that the respondents herein have combined to effect a stabilization and maintenance of prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

D. The Denial of Due Process

I. A&P's Contentions

202. A&P contends that it has been denied procedural due process in the presentation of its defenses and in its ability to cross-examine complaint counsel's witnesses due

to the loss of witnesses and documentary evidence that would have been available but for the Commission's delay in issuing the complaint. The Commission ruled on January 19, 1973:

> ...The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A&P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission's staff on a continuing and regular basis during the period March 1967-December 1969.

The Commission went on, however, to note that

> ...the question of alleged unfair prejudice to A&P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings.

a. The Unavailability of Documents

203. A&P contends that its defense in this case was hampered because its subpoenas proved unfruitful and that the lack of response thereto was occasioned by loss or destruction of documents due to the passage of time. In this connection, it offered RAPX 135 and 136, being summaries of the subpoenas directed to retail stores and dairies, respectively. In these exhibits there are repeated references by the deponents of the subpoenas involved that "no documents are available" in response to

certain specifications of the subpoenas. It does not appear, however, that the unavailability of the documents was necessarily due to the passage of time. Thus, at page 7283 of the transcript Mr. Dembrow, an attorney for A&P, was asked why documents not produced were "not available". The following testimony then took place:

> "THE WITNESS: No, I would have no other information as to why they did not supply us with the documents. All I know is we never received any documents that were responsive in whole or in part to the specifications in question. ---
>
> JUDGE HINKES: And that we are not to assume from that type of a response that the documents ever existed or were destroyed earlier or were simply not found by the Respondents or any other reason for their non-response?
>
> THE WITNESS: Well, I think in general, Your Honor, that is correct..."

* * *

> "JUDGE HINKES: All I am saying is do we have any evidence---I don't want the assumptions now. Does this document contain reasons for the non-response in evidence?
>
> THE WITNESS: No, the reason for non-response is not indicated except in those few instances where I think Complaint counsel pointed to one that was not in the Chicago metropolitan area. Something like that or one that was not selling to wholesale stores.
>
> JUDGE HINKES: I am only speaking now of the responses where nothing was said except 'No documents available' and was signed by the dairy.

THE WITNESS: That simply means that we physically ...by 'we' I mean the respondents--- cannot receive documents or information in letter form that pertained to specific items in our subpoenas.

JUDGE HINKES: And this exhibit contains no explanation for that failure, is that correct?

THE WITNESS: That would be correct, Your Honor."

204. In many instances the records sought were never kept or, if kept, were only so maintained for a brief period of time and then discarded. See, for example, the affidavit of Bruce Spear, an attorney for A&P, constituting an attachment to A&P's motion of October 13, 1972, to dismiss the complaint. In it, Mr. Spear relates his interviews with certain retail store operators. Some of them spoke of discarding records after maintaining them for only two to six months. Others discarded records after their replacement by more current schedules. Still others discarded them after completion of the tax audit. Another said that he doubted that records were kept other than on a current basis.

205. It is thus clear that even had the complaint been issued within a reasonably short period of time following the commencement of the investigation such records would have been unavailable even then and their unavailability to A&P when the complaint was issued years later cannot be the result of the passage of such time.

b. The Unavailability of Witnesses

206. A&P also contends that as a result of the delay by the Commission in instituting this proceeding the testimony of certain individuals who died in the interim became unavailable Thus, Joseph Malone, Borden's Vice-President, Regulatory Controls, and formerly Comptroller, died prior to the start of hearings in this matter. His deposition, however, had been taken by complaint counsel and it was received in evidence (CX 262). A&P contends, however, that it had not yet begun its program of discovery when the deposition was taken nor had it begun its cost study of the private label

prices received by A&P. Consequently, "detailed probing examination of Malone which was essential to the proper resolution of the various issues surrounding Borden's cost of serving A&P and the cost of serving its non-A&P customers...was not possible".

207. Complaint counsel filed their application for taking the deposition of Mr. Malone on November 4, 1971. Said application was granted by the Administrative Law Judge by order dated November 8, 1971, in which the Judge noted:

> The application states the complaint to involve a private label milk arrangement between respondents A&P and Borden beginning in 1965 and continuing to date. The negotiations giving rise to the agreement are stated to extend back to 1964 with the three principal negotiators for Borden during 1964 and 1965 to be now retired from said company. ...The three negotiators are described as now being elderly and their testimony to be of importance to proof of the charges of the complaint. [One of the three negotiators was identified as Jospeh Malone]

The order went on to describe the nature of the expected testimony in considerable detail, specifically referring to "Borden's relationships and dealings with A&P and competing retail grocery purchasers in the Chicago area... The witnesses' own roles in the dealings with A&P concerning the Chicago area private label arrangement...the pricing and sales practices of Borden in connection with its sales to A&P and competing purchasers in the Chicago area, etc." Pursuant to said order Malone first took the stand on December 3, 1971. Counsel for each of the parties attended said appearance but due to a dispute regarding Malone's request for immunity his testimony was then postponed until February 9, 1972. At that time Malone was examined by complaint counsel and cross-examined by counsel for both Borden and A&P.

208. Considering that A&P was on notice of Malone's testimony as early as November 8, 1971, attended Malone's first appearance on December 3, 1971, as well as his actual testimony on February 9 and 10, 1972, at which time it participated in the examination of the witness; considering

also that A&P under the Commission's Rules was also entitled to take the deposition of Mr. Malone at any time either for discovery purposes or to preserve evidence but failed to do so; and considering also that A&P was able to use Mr. Daube who worked for Borden in the Chicago central district from 1958 until 1966 as Chief Accountant and Assistant District Controller and then became Assistant to the District Controller when the Chicago Central District was merged with the Midwest District in Columbus, Ohio (Daube, Tr. 5864-5870), I conclude that A&P's failure to examine Mr. Malone prior to his death is attributable to its neglect or failure to take advantage of the opportunities and rights it had as a party to this proceeding and in any event, was not prevented by any delay in the institution of this proceeding.

209. A&P also claims prejudice to its case resulting from the unavailability of David Parmalee, Bowman's Senior Cost Accountant, who died prior to the start of hearings. It appears, however, that A&P interviewed Mr. Parmalee after the complaint was filed and it is only reasonable to assume that if Mr. Parmalee's testimony would be helpful, A&P would have followed complaint counsel's example with Mr. Malone and taken his deposition as well (affidavit of Denis McInerney, October 13, 1972, page 13). Moreover, A&P admits that Parmalee's testimony would have merely supplemented Cannon's testimony who did appear and testify (A&P Proposed Findings, Volume 1, p. 508). Here, too, therefore, A&P's failure to have Parmalee's testimony is due to its own oversight rather than any delay in the institution of this proceeding.

210. A&P also cites the unavailability of the testimony of L. Edward Hart, an attorney who worked very closely with Bowman's management in connection with a court order prohibiting discriminatory prices by Bowman. Mr. Hart died prior to the start of the hearings but it is doubtful that his testimony would be received in evidence inasmuch as a claim of privilege in connection with his work as an attorney for Bowman could be expected. Moreover, the testimony of Mr. Hart, like that of Mr. Parmalee, would have been only supplementary to that of Mr. Cannon who did testify (A&P Proposed Findings, Vol. 1, p. 508).

211. A&P notes that testimony of two other witnesses was unavailable due to their deaths prior to the start of hearings. One of these was Walter Roney, Chief Executive Officer for High-Low Foods. His death, however, occurred in 1969 (A&P Proposed Findings, Vol. 1, p. 501). The

unavailability of his testimony, therefore, can hardly be attributed to any unreasonable delay in the institution of this proceeding. The other witness referred to by A&P is Fred Nonnamaker, a former Bowman Company employee who died prior to the filing of the complaint. It was his death that prompted complaint counsel to seek the depositions of Messrs. Malone, Minkler and Tarr on November 4, 1971. Presumably, complaint counsel was seeking testimony which could be used against A&P and this could explain A&P's failure to seek Nonnamaker's deposition any earlier. In any event, his unavailability is a loss to all of the parties in this proceeding. A&P has failed to demonstrate any particular prejudice to it as a result of his death prior to the start of hearings.

212. The record in this proceeding makes it clear that both A&P and Borden were aware, even before service began under their contract, that their private label arrangement would probably result in litigation (Smith, Tr. 1429). Certainly, the Commission's investigation of this case was brought to the attention of Borden and A&P as early as February 1967 when an attorney-examiner for the Commission contacted both respondents requesting certain data and supporting interviews with company personnel concerning the private label agreement between the respondent and possible violations of the Clayton Act and the Federal Trade Commission Act. All of this has already been called to the attention of the Commission in connection with A&P's motion to dismiss the complaint filed on October 13, 1972, and complaint counsel's answer thereto filed on October 20, 1972. If, indeed, A&P failed to prepare itself for its defense to the complaint that was issued later, its failure must be deemed the result of its own oversight and neglect, having been repeatedly put on notice and having obviously realized even before the commencement of the private label agreement that some litigation was likely in connection therewith. The Commission took steps to prepare for such litigation although it, too, experienced the loss of some witnesses and data. For example, potential witness Nonnamaker died before his deposition could be taken. He had testified in the Dean-Bowman case, Docket 8674 to the effect that Bowman's relationship with A&P was such that it could not expect to obtain any A&P business under any circumstances (Docket 8674, Tr. 2207-2208). ("Bowman couldn't get [the A&P account] if the Lord Himself were their solicitor"). Such testimony in this proceeding would have demonstrated that the Bowman offer to A&P was a sham and could not be used legitimately by A&P for a meeting competition defense.

213. I conclude, therefore, that there has not been an unjustifiable delay in the filing of the complaint considering the difficulty the Commission experienced in marshalling its evidence from the respondents. As the Commission noted in its order of January 19, 1973,

> The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission.

In addition, any prejudice experienced by the respondents herein by the passage of time between the commencement of the investigation and the issuance of the complaint herein, appears to be minimal and the result of the respondents' indifference to the likelihood of litigation resulting from their private label agreement which they themselves anticipated and which was brought to their attention by the activities of the Commission as early as February 1967.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents The Great Atlantic & Pacific Tea Company, Inc., (hereinafter A&P) and Borden, Inc. (hereinafter Borden).

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. Respondent A&P in the course and conduct of its business in commerce has acted unfairly and deceptively in purchasing milk and dairy products from Borden in that it accepted a price offer from Borden tendered on a meeting competition basis when in fact such meeting competition defense was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act and in violation of Section 5 of the Federal Trade Commission Act.

4. Respondent A&P in the course and conduct of its business in commerce has knowingly induced or received a discrimination in price in the purchase of fluid milk and other dairy products in violation of subsection (f) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

5. Complaint counsel have not satisfied their burden of proof to show that respondents A&P and Borden in the course and conduct of their business in commerce entered into a combination which had a tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

THE REMEDY

As a result of the failure of proof in connection with Count III of the complaint, a dismissal of said Count will be ordered.

As respects Count I of the complaint, complaint counsel propose that A&P be directed to inform prospective suppliers who submit prices on a meeting competition basis if the price offered beats existing competitive offers. It is contended that such requirement does no more than obligate A&P to comply with its statutory duties. The order proposed, however, would cover not only milk and other dairy products but any product. Moreover, if A&P informs a supplier that a competitive offer has been made to A&P and a supplier makes an offer based on the meeting of the competitive offer, A&P would be required under the proposed order to notify the supplier that the price being offered is below the existing competitive offer to A&P if such be the case.

With respect to Count II of the complaint, complaint counsel's proposed order would direct A&P not to violate Section 2(f) of the Robinson-Patman Act again in any product line rather than merely in milk and other dairy products. Moreover, the proposed order would prohibit A&P's inducement, receipt or/and acceptance of a net price which it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers competing with A&P unless A&P shows that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of differing methods or quantities or said price was granted to meet a lawful equally low price of a competitor.

With respect to the proposed coverage of all products in both Count I and Count II of the complaint, complaint counsel contend that A&P's violation was "not an isolated incident relating to milk. Rather it was an action in the context of A&P's entire business"; and that without such coverage "A&P could easily evade the order simply by turning its attention to other areas in its diverse product line where similar anticompetitive practices would be equally fruitful".

It is well settled that the Federal Trade Commission has wide discretion in its choice of the remedy adequate to cope with the unlawful practices disclosed. FTC v. Ruberoid Co., 343 U.S. 470 (1952). The validity of the Commission order is gauged by its reasonable relation to the unlawful practices found to exist. FTC v. Colgate-Palmolive, 380 U.S. 374 (1965); National Lead Co. v. FTC, 352 U.S. 419 (1957). A&P points out, however, that the Commission itself has recognized situations where a broad order would not be appropriate, Quaker Oats Co., 60 FTC 798 (1962). In that case the order was limited to "cat food and products related to cat food". Similarly, in National Dairy Products Corp. v. Federal Trade Commission, 412 F.2d 605 (7th Cir. 1969) the order was limited to the product line of the single division found to have made the unlawful discriminations. See also American Home Products Corp. v. Federal Trade Commission, 402 F.2d 232 (6th Cir. 1968).

It is particularly noteworthy that complaint counsel have drawn a parallel between this case and the Kroger case, 76 FTC 719 (1969). There, as here, the buyer went beyond the bounds of permissible bargaining by misquoting the competitive offer or failing to convey correct information. The order issued in the Kroger case was limited to milk and other dairy products despite the fact that Kroger, a national grocery chain, obviously had other products which could be subject to the same abuse. In that case, however, the order was not limited to the Charleston division of Kroger where the discriminations took place but to "outlets operated by respondent". Consequently, the order herein will be limited to fluid milk and other dairy products but will apply to A&P's outlets wherever operated by A&P.

As respects Count II, A&P argues that it cannot comply with the order proposed by complaint counsel because of the burden on A&P. It contends that it would be enjoined from receiving a net price on any product which it knows or should know is below the net price at which the product is being offered to any A&P competitor unless A&P is able to demonstrate that it knew or had reason to believe that the lower price to A&P was cost justified or that the lower price was given to A&P to meet a lawful, equally low price offered to A&P by another supplier. It argues that this would require A&P to cost justify its suppliers' prices, a burden which cannot be properly placed on a buyer who cannot obtain the costing information required (Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

A&P, however, confuses the burden of proof requirement with the obligation of law. A&P cannot induce or accept a discriminatory price from a supplier where it knows or has reason to know that the lower price to it cannot be cost justified or that the lower price given to it was not to meet a lawful equally low price offered by another supplier. The burden of proof, however, remains with complaint counsel under the doctrine of Automatic Canteen. This is not unlike the situation in Count I where A&P is forbidden to engage in misrepresentations but the burden of proving the misrepresentations still rests upon complaint counsel. A&P's objection to the proposed order with respect to Count II, therefore, is reasonable only to the extent that it suggests shifting the burden of proof to A&P. The order herein corrects that error.

A&P also objects to the proposed order arguing that other statutory defenses available to it are excluded by the language of the order since it does not mention such defenses as lack of knowledge of the discrimination or lack of injury to competition. This argument was also raised in the Ruberoid case, supra;

> [The absence of such provisos] cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos.

In that case the order simply prohibited Ruberoid from discriminating in price by selling its products to any purchaser at prices lower than those granted other purchasers who compete with the favored purchaser in the resale of the products. The court found it unnecessary to specify the statutory defenses. Here, too, unmentioned statutory defenses available to A&P have not been negated nor lost to A&P by reason of their omission.

ORDER

IT IS ORDERED that respondent, The Great Atlantic & Pacific Tea Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through the use of any corporate or other device in or in connection with the offering to purchase or purchase of fluid milk and other dairy products in commerce as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by the respondent, do forthwith cease and desist from:

(a) misleading any supplier of fluid milk or other dairy product by misrepresenting a material fact which could reasonably be expected to affect the suppliers' price to A&P; and

(b) directly or indirectly inducing, receiving or accepting from any seller a net price it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where A&P is competing with the purchaser paying the higher price, unless A&P knew or had reason to believe that the price difference in its favor made only due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers or said price was granted to it by the supplier to meet a lawful equally low price of a competitor. For the purpose of determining the "net price" under the terms of this order there shall be taken into account all discounts or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that A&P shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect its compliance obligations arising out of the order.

IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

IT IS FURTHER ORDERED that Count III of this complaint be, and the same hereby is, dismissed.

Harry R. Hinkes
Administrative Law Judge

September 24, 1975

PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST PRICE AVAILABLE TO ITS COMPETITORS IN THE "CHICAGO & SUBURBS AREA" 11/65-12/68

Appendix

HOMO - HALF-GALLONS - PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price 1/	Minimum Price	Maximum Discount From List Price 2/	Private Label Price 3/	Discount From List Price	Percent Overcharge 4/
11/65-1/66	$0.49	$0.3479	29.0%	$0.3124	36.2%	11.4%
1/66-2/66	.49	.3430	30.0%	.3124	36.2%	9.8%
2/66-5/66	.51	.357	30.0%	.3254	36.2%	9.7%
5/66-8/66	.52	.364	30.0%	.3254	37.4%	11.9%
8/66-9/66	.54	.378	30.0%	.3376	37.5%	12.0%
9/66-10/66	.56	.392	30.0%	.3514	37.3%	11.6%
10/66-11/66	.56	.392	30.0%	.3534	36.9%	10.9%

1/ Source: CX 137, 139-150.

2/ Sources: CX 120, 138; Gose Tr. 1110.

3/ Source: CX 255B.

4/ Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A & P.

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/66-3/67	$0.56	$0.392	30.0%	$0.3514	37.3%	11.6%
3/67-4/67	.55	.385	30.0%	.3376	38.6%	14.0%
4/67-5/67	.55	.385	30.0%	.3416	37.9%	12.7%
5/67	.57	.399	30.0%	.3502	38.6%	13.9%
5/67-9/67	.57	.399	30.0%	.3534	38.0%	12.9%
9/67-5/68	.59	.413	30.0%	.3664	37.9%	12.7%
5/68-7/68	.61	.427	30.0%	.3762	38.3%	13.5%
7/68-12/68	.62	.434	30.0%	.3828	38.3%	13.4%

HOMO - GALLONS - PAPER

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.98	$0.6958	29.0%	$0.6248	36.2%	11.4%
1/66-2/66	.98	.686	30.0%	.6248	36.2%	9.8%
2/66-5/66	1.02	.714	30.0%	.6508	36.2%	9.7%
5/66-8/66	1.04	.728	30.0%	.6508	37.4%	11.9%
8/66-9/66	1.08	.756	30.0%	.6752	37.5%	12.0%
9/66-10/66	1.12	.784	30.0%	.7028	37.3%	11.6%

Initial Decision
001009

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
10/66-11/66	$1.12	$0.784	30.0%	$0.7068	36.9%	10.9%
11/66-3/67	1.12	.784	30.0%	.7028	37.3%	11.6%
3/67-4/67	1.10	.770	30.0%	.6752	38.6%	14.0%
4/67-5/67	1.10	.770	30.0%	.6832	37.9%	12.7%
5/67	1.14	.798	30.0%	.7004	38.6%	13.9%
5/67-9/67	1.14	.798	30.0%	.7068	38.0%	12.9%
9/67-5/68	1.18	.826	30.0%	.7328	37.9%	12.7%
5/68-7/68	1.22	.854	30.0%	.7524	38.3%	13.5%
7/68-12/68	1.24	.868	30.0%	.7656	38.3%	13.4%

Initial Decision
001010

HOMO - QUARTS - PAPER

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.265	$0.1882	29.0%	$0.1712	35.4%	9.9%
1/66-2/66	.265	.1855	30.0%	.1712	35.4%	8.4%
2/66-5/66	.275	.1925	30.0%	.1777	35.4%	8.3%
5/66-8/66	.28	.1960	30.0%	.1777	36.5%	10.3%
8/66-9/66	.29	.2030	30.0%	.1838	36.6%	10.5%
9/66-10/66	.30	.2100	30.0%	.1907	36.4%	10.1%
10/66-11/66	.30	.2100	30.0%	.1917	36.1%	9.6%
11/66-3/67	.30	.2100	30.0	.1907	36.4	10.1%
3/67-4/67	.295	.2065	30.0%	.1838	37.7%	12.4%
4/67-5/67	.295	.2065	30.0%	.1858	37.0%	11.1%
5/67	.305	.2135	30.0%	.1901	37.7%	12.3%

Appendix

Date	Borden List Price	Non-A&P Stores: Minimum Price	Non-A&P Stores: Maximum Discount From List Price	A&P Stores: Private Label Price	A&P Stores: Discount From List Price	Percent Overcharge
5/67-9/67	$0.305	$0.2135	30.0%	$0.1917	37.2%	11.4%
9/67-4/68	.315	.2205	30.0%	.1982	37.1%	11.3%
4/68-7/68	.325	.2275	30.0%	.2031	37.5%	12.0%
7/68-12/68	.33	.2310	30.0%	.2064	37.5%	11.9%

2% MILK - 1/2 GALLON - PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.46	$0.3266	29.0%	$0.2914	36.7%	12.1%
1/66-2/66	.46	.3220	30.0%	.2914	36.7%	10.5%
2/66-5/66	.48	.3360	30.0%	.3044	36.6%	10.4%
5/66-8/66	.49	.3430	30.0%	.3044	37.9%	12.7%
8/66-9/66	.51	.3570	30.0%	.3166	37.9%	12.8%
9/66-10/66	.53	.3710	30.0%	.3304	37.7%	12.3%
10/66-11/66	.53	.3710	30.0%	.3324	37.3%	11.6%
11/66-3/67	.53	.3710	30.0%	.3304	37.7%	12.3%
3/67-4/67	.52	.3640	30.0%	.3166	39.1%	15.0%
4/67-5/67	.52	.3640	30.0%	.3206	38.4%	13.5%
5/67	.54	.3780	30.0%	.3292	39.0%	14.8%

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
5/67-9/67	$0.54	$0.3780	$30.0%	$0.3324	38.4%	13.7%
9/67-5/68	.56	.3920	30.0%	.3454	38.3%	13.5%
5/68-7/68	.58	.4060	30.0%	.3552	38.8%	14.3%
7/68-12/68	.59	.4130	30.0%	.3618	38.7%	14.2%

SKIM MILK - 1/2 GALLON - PAPER

Appendix

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.46	$0.3266	29.0%	$0.2834	38.4%	15.2%
1/66-2/66	.46	.3220	30.0%	.2834	38.4%	13.6%
2/66-5/66	.48	.3360	30.0%	.2964	38.2%	13.4%
5/66-8/66	.49	.3430	30.0%	.2964	39.5%	15.7%
8/66-9/66	.51	.3570	30.0%	.3086	39.5%	15.7%
9/66-10/66	.53	.3710	30.0%	.3224	39.2%	15.1%
10/66-11/66	.53	.3710	30.0%	.3244	38.8%	14.4%
11/66-3/67	.53	.3710	30.0%	.3224	39.2%	15.1%
3/67-4/67	.52	.3640	30.0%	.3086	40.7%	18.0%
4/67-5/67	.52	.3640	30.0%	.3126	39.9%	16.4%
5/67	.54	.3780	30.0%	.3212	40.5%	17.7%

Initial Decision 001015

Appendix

Date	Borden List Price	Non-A&P Stores		A&P Stores		Percent Overcharge
		Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	
5/67-9/67	$0.54	$0.3780	30.0%	$0.3244	39.9%	16.5%
9/67-3/68	.56	.3920	30.0%	.3374	39.8%	16.2%
3/68	.56	.3920	30.0%	.3000	46.4%	30.7%
3/68-5/68	.56	.3920	30.0%	.3374	39.8%	16.2%
5/68-7/68	.58	.4060	30.0%	.3472	40.1%	16.9%
7/68-12/68	.59	.4130	30.0%	.3538	40.0%	16.7%

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 8866

IN THE MATTER OF:

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al

ORDER

F. T. C. 4-511

FTC L-3556

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

FINAL ORDER

This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

FINAL ORDER

IT IS ORDERED that, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the Administrative Law Judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

IT IS FURTHER ORDERED that the following order be, and it hereby is, entered:

ORDER

IT IS ORDERED that A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers with whom A&P is competing--provided, however, that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts and other terms and conditions of sale.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

IT IS FURTHER ORDERED that A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising under this order.

IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

By the Commission. Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

SEAL

ISSUED: April 29, 1976

Chas. A. Tobin

Charles A. Tobin,
Secretary.

OPINION OF COMMISSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

OPINION OF THE COMMISSION

By NYE, Commissioner:

The complaint in this matter was issued on October 8, 1971. 1/ Count I of the complaint charged that The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") violated Section 5 of the Federal Trade Commission Act

---

1/ For convenience, the following abbreviations are used in this opinion:

I.D.--Initial decision of administrative law judge (Cited by paragraph number).
Tr.--Transcript of testimony (Cited by page number).
CX--Commission exhibit.
RX--Respondent A&P exhibit.

Citations to "Appeal," "Answer," and "Reply" refer to the briefs filed in reference to Counts I and II. Citation to "C.C. Appeal" refers to complaint counsel's appeal brief filed in reference to Count III.

(hereinafter the "FTC Act"; 15 U.S.C. §45) as well as the policy of Section 2 of the amended Clayton Act (hereinafter the "Robinson-Patman Act"; 15 U.S.C. §13) by misleading Borden, Inc. (hereinafter "Borden") during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The gravamen of the charge is that A&P failed to inform Borden that Borden's offer, purportedly made to meet a competitive bid received by A&P from another potential supplier, was, in fact, substantially lower than that other bid. Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)) by knowingly inducing or receiving discriminations in price from Borden, which discriminations are prohibited by Section 2(a) of that Act. Finally, Count III charged that both A&P and Borden violated Section 5 of the FTC Act by combining to stabilize and to maintain the retail and wholesale prices of milk and other dairy products.

Hearings were held before Administrative Law Judge Harry R. Hinkes, and an initial decision was rendered on September 24, 1975. Judge Hinkes found that A&P had violated the law as charged in Counts I and II but dismissed Count III. Judgment was entered accordingly.

A&P has appealed from the decision, asserting that it did not violate the law as charged in Counts I and II. Complaint counsel has appealed from the decision, arguing that A&P and Borden violated the law as charged in Count III. The Commission heard oral arguments on these appeals on February 25, 1976.

OPINION OF COMMISSION

The decision of Judge Hinkes is affirmed as to Counts II and III but reversed as to Count I. Except as qualified or altered by this opinion, we adopt his findings and conclusions. We have substituted a new order.

I. Factual Background

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden under which Borden began supplying private label milk and other dairy products to more than 200 A&P stores in an area that included portions of Illinois and Indiana.

From the record, it appears that in November of 1964, Herschel Smith, A&P's Headquarters Dairy Buyer in New York, advised A&P's Divisional Purchasing Directors of the savings that could be realized by switching from advertised brand to private label milk (Tr. 1350-1351, 1862-1863). Soon thereafter, A&P asked Borden to submit an offer to supply, under private label, certain of A&P's milk and other dairy product requirements in the Chicago area, where Borden had served A&P since the late 1950's. From then until August 13, 1965, A&P and Borden engaged in extensive negotiations which culminated in Borden's offer to grant A&P a discount for switching to private label, provided that A&P would accept limited delivery service (CX 36, 37). Borden claimed that this proposal would reduce A&P's costs by $410,000 per annum compared to what A&P had been paying (CX 37; Tr. 869-871). A&P decided that it was not satisfied and solicited offers from other dairies (Tr. 871; see Tr. 1361-1362).

Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (See CX 65A; A&P's Proposed Findings at 121-122). 2/ On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; see CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

In consequence, Borden offered to submit a new bid which doubled the savings to A&P from $410,000 to $820,000 (Tr. 227-228). In presenting the offer, Borden emphasized to A&P that Borden needed to keep A&P's business and was making the new offer solely to meet the described competitive bid (Tr. 228). Of course, as noted, Borden knew very little about the competitive bid that it was purporting to meet. Later, Borden submitted a detailed offer (CX 56), which it slightly revised to meet some of A&P's specific demands (CX 62). 3/

2/ Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

3/ After submission of the bid, Borden excluded glass gallons because A&P stated that "it is not fair to the other bidders." (Tr. 884). In fact, however, the Bowman bid had included a quote on glass gallons (CX 50). A&P also told Borden to "sharpen your pencil a little bit because you are not quite there" meaning, according to Borden's Tarr, that Borden had not yet met the competitive bid (Tr. 885).

A&P concluded at the time that Borden's offer was "substantially better" in price 4/ than Bowman's (Tr. 1413-1414, 1896-1997; CX 263), and therefore, in October of 1965, A&P accepted it (Tr. 1413; CX 71). The offer was, in fact, much better in price than Bowman's (*See* CX 263B; compare CX 75F-J with CX 50).

A&P's Schmidt requested a letter from Borden which would state that the prices Borden had quoted were proportionately available to competitors of A&P (Tr. 1783, 1786). Borden supplied a letter stating simply that the prices were legal and that Borden would defend them (RX 2). In fact, officials of Borden thought that the other bids were based on "anyhow accounting"--including only out-of-pocket or direct costs--and informed A&P of their belief (CX 63; *see* Tr. 213-214, 872-873, 955).

II. Count I: Failing to Inform

Count I charged that A&P violated Section 5 of the FTC Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was

---

4/ A&P was only interested in obtaining the lowest price possible (CX 25B, 263B; Tr. 1400-1401, 1728-1729).

substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; see Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the FTC Act (I.D. 115, 116). 5/

At the outset we emphasize our belief that Section 5 of the FTC Act can reach actions that violate the policy of the Robinson-Patman Act, cf. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972), and, further, that Section 5 should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act. 6/ It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. Fred Meyer, Inc. v. FTC, 359

5/ Although A&P made certain misrepresentations, see note 3, supra, such misrepresentations are not relevant to the charge.

6/ "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role . . . Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate . . . and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968); *Giant Food Inc.* v. *FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co.* v. *FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union*, the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman Act. *Id.* at 98. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), stated in describing normal practice:

> The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal bargaining process . . . might well deprive the public of gains that under effective competition it has a right to expect." Report, supra note 6, at 196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the FTC Act. 7/ Therefore, Count I should be dismissed.

7/ We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer.

[footnote continued on next page]

III. Count II: Knowingly Inducing or Receiving Discriminations in Price

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act. 8/

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. Automatic Canteen Co. v. FTC, 346 U.S. 61, 70 (1953). In order to

---

7/ (Cont'd)

For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945); Viviano Macaroni Co. v. FTC, 411 F.2d 255, 257-58 (3d Cir. 1969).

8/ Section 2(f) reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 2(a) reads in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b). 9/

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

a. In Commerce

The Robinson-Patman Act forbids discriminatory pricing arrangements only "where either or any of the purchases involved in such discrimination are in commerce." 15 U.S.C. § 13(a). Therefore to conclude that jurisdiction exists to

---

9/ Section 2(b) reads in pertinent part:

> . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . .

prosecute A&P, either A&P's or its competitors' purchases must be "in commerce." Recently, the Supreme Court has reiterated its position that at least one of the two transactions which result in the discrimination must cross a state line. *Gulf Oil Corp*. v. *Copp Paving Co*., 419 U.S. 186, 199-201 (1974). Although A&P does not dispute the finding that the sales to stores in Indiana are "in commerce" for Robinson-Patman Act purposes, A&P argues that the "in commerce" requirement is not met for the Illinois sales.

We reject A&P's claim. In *Foremost Dairies, Inc*. v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the respondent dairy claimed that none of its sales were made in interstate commerce although 20% of its raw milk came from out-of-state. The dairy sold fluid milk processed in its Albuquerque, New Mexico plant to stores in Albuquerque. In holding that the "in commerce" requirement was met, the Court stated:

> [T]he milk passed in a steady flow from the farms in Colorado through the Santa Fe processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in Albuquerque . . . [U]nder the stream of commerce doctrine, milk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization. *Id*. at 677.

Other courts concur with the reasoning and results in *Foremost Dairies*. *E.g.*, *Dean Milk Co*. v. *FTC*, 395 F.2d 696, 714-715 (7th Cir. 1968) (25% of raw milk came from out-of-state).

Most of the raw milk used by Borden's Woodstock, Illinois dairy--approximately 60%--came from Wisconsin (Borden Admission at 8, Sept. 29, 1972). This dairy supplied substantially all of the private label milk sold to A&P (Borden Response at 5, May 3, 1972; A&P Admission at 7, Sept. 27, 1972). Finally, the processing in Woodstock did not interrupt the flow of milk from the farm to A&P's stores (I.D. 17, 168; _see_ Borden Additional Admission at 13-14, March 15, 1973; Tr. 107-109). Therefore, the _Foremost Dairies_ test is met.

In addition, the negotiations leading up to the agreement between A&P and Borden were multi-state in nature (Tr. 1711) and therefore "in commerce" (I.D. 167). _See Beatrice Foods Co._, 76 F.T.C. 719, 747 (1969). A&P's Schmidt testified that A&P would not accept an offer to supply only a portion of its stores in Illinois and Indiana (Tr. 1711; _see_ Tr. 6126-27).

b. _Discrimination in price and competitive injury_

The Robinson-Patman Act requires both that a discrimination in price take place and that the possible effect of such discrimination be substantially to lessen competition or to injure, destroy, or prevent competition with a primary or secondary line competitor or with a direct or indirect customer of the buyer. 10/ In addition, to conclude that a Section 2(f) violation has taken place, it must be found that the buyer knowingly received the illegal price discrimination. Automatic Canteen Co. v. FTC, supra, 346 U.S. at 71. A&P argues that the evidence fails to demonstrate that it was a beneficiary of a price discrimination or that competition was injured. A&P criticizes the price comparisons of complaint counsel, the representativeness of the competitors who were allegedly injured, and the establishment of substantial injury. In addition, A&P states that it did not know that it was a beneficiary of an illegal price discrimination.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in Beatrice Foods Co., 76 F.T.C. 719, 806 (1969), aff'd sub nom., Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether

---

10/ Although one could conceivably argue that injury at the primary or seller level took place, complaint counsel limited their case to proving secondary or buyer level discrimination.

discrimination took place. The Kroger Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense.

We are unclear as to what A&P means when it argues that the sample of stores must be "representative." As the Court in Kroger Co. v. FTC, id. at 1378, stated, "[E]vidence of discrimination in only one area is sufficient to meet the requirements of the Act." Accord, Foremost Dairies, Inc. v. FTC, supra, 348 F.2d at 681. "[U]nless minuscule, the portion of the market that might be affected by the charging of these discriminatory prices is immaterial." National Dairy Products Corp. v. FTC, 395 F.2d 517, 522-23 (7th Cir.), cert. denied, 393 U.S. 977 (1968). The area studies 11/ presented by complaint counsel are quite detailed and are, in fact, representative of the areas allegedly affected (See, e.g., CX 182; RX 234 at 19). If anything, complaint counsel has exceeded any requirement of "representativeness" (See I.D. 121).

11/ These include Chicago and its suburbs, Gary-Hammond, and Valparaiso, Indiana.

In addition, complaint counsel has shown that competitive injury occurred, regardless of whether we applied the reasonably "possible" test, *e.g.*, *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Purolator Products, Inc.* v. *FTC*, 352 F.2d 874, 881 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968), or the "probable" test, *Foremost Dairies, Inc.* v. *FTC*, *supra*, 348 F.2d at 680. 12/ The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place. *National Dairy Products Corp.* v. *FTC*, *supra*, 395 F.2d at 521. "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected." *FTC* v. *Morton Salt Co.*, *supra*, 334 U.S. at 46 n. 14.

We note that many courts have discussed the significance of differences in the prices charged to competing businesses in industries such as retail food, which are characterized by keen competition and low profit margins. *E.g.*, *Kroger Co.* v. *FTC*, *supra*, 438 F.2d at 1379; *Fred Meyer, Inc.* v. *FTC*, *supra*, 359 F.2d at 367; *see* *United Biscuit Co. of America* v. *FTC*, 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). Milk is one of the most important

---

12/ As the court in *Foremost Dairies* noted, 348 F.2d at 680 n. 11, "[T]he distinction between the two standards may be more apparent than real."

commodities carried in retail grocery stores (A&P Admission at 3, March 1, 1973). Therefore, discriminations in favor of A&P amounting to as much as 22.5% (Model Food Center, CX 182, 187, 191A) 13/ in this extremely competitive, price sensitive industry compel an inference of adverse competitive effect. *See*, *e.g.*, *FTC* v. *Morton Salt Co.*, *supra*, 334 U.S. at 46-47; *Kroger Co.* v. *FTC*, *supra*, 438 F.2d at 1379. 14/ That A&P did not pass the discount on as a lower price to consumers does not rebut the inference. *Foremost Dairies Inc.* v. *FTC*, *supra*, 348 F.2d at 680. For example, in receiving the price discount, A&P enlarged its profit margin (*See* CX 185, 255; Tr. 2059-2060) 15/ and thereby obtained a material capital advantage in this highly competitive field. *See Kroger Co.* v. *FTC*, *supra*, 438 F.2d at 1378; *Foremost Dairies, Inc.* v. *FTC*, *supra*, 348 F.2d at 680.

13/ The *Kroger* Court, 438 F.2d at 1379 n. 4, listed examples of discounts in secondary line cases. The discounts to A&P are in line with those found to cause injury in other cases. For example, the Court in *Foremost Dairies, Inc.* v. *FTC*, *supra*, 348 F.2d at 675, found competitive injury where discounts were as low as 5%.

14/ The Court in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248, 1252 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), a private Robinson-Patman Act action, stated that a price differential alone establishes competitive injury. There is no need to prove a lessening of competition to obtain damages.

15/ The profit margins of the unfavored competitors were very low, ranging from less than 1% to 5% (*See* Appendix 4 [in camera]; CX 184, 189, 192, 199A, 199 J-Z, 201, 203 [all in camera]; I.D. 88).

Finally, we address the issue of knowledge. A&P admitted that milk is one of the most important commodities in groceries and that milk is a staple purchased more frequently by consumers than other products (A&P Admission at 3, March 1, 1973). It is acknowledged that selling milk at a higher price than one's competitors will cause some consumers to switch stores. A&P also admitted that profit margins in the retail grocery business are very low (A&P Admission at 4, March 1, 1973). Therefore, A&P, by virtue of its trade experience or simply common sense, knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects (see I.D. 86-88, 97). Accordingly, we reject A&P's arguments.

c. Meeting Competition

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. Automatic Canteen Co. v. FTC, supra, 346 U.S. at 74. The Court in Kroger Co. v. FTC, supra, 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

> Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. Automatic Canteen v. FTC, supra, 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid "beat" the Bowman bid yet A&P contemporaneously reasonably believed that it only met the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. See FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945). 16/ However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

We assume, arguendo, that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid.

16/ A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

However, while we believe that the Bowman bid was comparable and operative, 17/ we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (See CX 263B; Compare CX 75 F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer (See citations in I.D. 106) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (See citations in I.D. 107). 18/

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a valid meeting

---

17/ Specifically, we reverse Judge Hinkes' conclusion to the contrary (See FF 103, 106-07, 114).

18/ The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45% (Tr. 5513), and the Bowman bid may not have called for 3.5% (Tr. 5450-5453, 5461, 6187-6188; see I.D. 129).

competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *see Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden. It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge. 19/

19/ Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*See* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC* v. *A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 759-760; *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co.* v. *Brown*, 238

[footnote continued on next page]

Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in Kroger Co. v. FTC, supra, found that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise . . . would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." Id. at 1377.

d. Cost Justification

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

19/ (Cont'd)

F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the Automatic Canteen case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," id. at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential. 20/ Rather, the Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. Id. at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." Id. at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not

---

20/ In Automatic Canteen, the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

cost justified. Id. at 80. The Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," id. at 80, concluding that the Commission should do this. 21/ Id. at 80-81; accord, Suburban Propane Gas Corp., 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

> [I]f complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. Beatrice Foods Co., supra, 76 F.T.C. at 820, quoting Suburban Propane Gas Corp., 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in Suburban Propane Gas Corp., supra, 73 F.T.C. at 1273--the burden of establishing a prima facie case or first going forward with the evidence may

---

21/ The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. E.g., Mid-South Distributors v. FTC, 287 F.2d 512, 518-19 n. 15 (5th Cir.), cert. denied, 368 U.S. 838 (1961).

be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit has affirmed our use of this rule. Kroger Co. v. FTC, supra, 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. See Automatic Canteen Co. v. FTC, supra, 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting competition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, Cost Justification of Price Differentials Under the Robinson-Patman Act, 59 Colum. L. Rev. 584, 610 (1959).

Finally, if the buyer satisfies the burden of meeting complaint counsel's _prima facie_ case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with complaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. _Suburban Propane Gas Corp._, _supra_, 73 F.T.C. at 1274-1275; _see Beatrice Foods Co._, _supra_, 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (_E.g._, Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (_See_ I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (_See_ Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified by the saving of such costs as advertising (_See_ CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (_See_ CX 75, 255; RX 66).

This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could only be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792). 22/ As the Supreme Court stated in Automatic Canteen Co. v. FTC, supra, 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." Accord, 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, supra note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. Cf. Beatrice Foods Co., supra, 76 F.T.C. at 821 (Because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems.).

22/ When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

Second, although A&P requested the customary assurances from Borden that Borden's discounts were available to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; see Tr. 1406, 1428, 1438-1440). 23/

Third, Borden provided A&P with detailed cost data during the course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices were available to others. See Fred Meyer, Inc. v. FTC, supra, 359 F.2d at 365-67. 24/ Of course, if the A&P-Borden contract was profitable for Borden before the

---

23/ Herschel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).

24/ Citing Automatic Canteen Co. v. FTC's language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

switch to limited service and Borden would lose money after the change, then A&P should have doubted whether the new prices could be cost justified (See I.D. 91-93). 25/

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. See Automatic Canteen Co. v. FTC, supra, 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); Kroger Co. v. FTC, supra, 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (See CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product. 26/

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to

---

25/ As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

26/ Of course, labels do not differentiate products for purposes of determining "like grade and quality." FTC v. Borden Co., 383 U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost justified (See I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; See CX 102, 103, 105, 106, 110). 27/ Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. See Automatic Canteen Co. v. FTC, supra, 346 U.S. at 80.

27/ This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (See I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. 1 at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

In conclusion, viewing all of these facts together, we find that complaint counsel fully established a prima facie case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified. 28/ The burden then shifted to A&P to demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (See A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate

---

28/ We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to . . . cost savings" (I.D. 90), it is at least conceivable that the $820,000 savings represented the amount Borden would save by switching to limited delivery service.

but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk. 29/ Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's prima facie case. As noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because the costs and conditions in the Chicago area were different (E.g., In-plant wages: CX 25C, 2[illegible] it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (See I.D. 98). 30/

29/ Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

30/ A&P's other arguments--for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)--also do not adequately rebut complaint counsel's strong showing.

Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation. 31/

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label products on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could be charged with knowledge that the prices were not cost justified. *See*

31/ Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

Automatic Canteen Co. v. FTC, supra, 346 U.S. at 74. 32/ We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. See id. at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

A&P asserts that "the most egregious example" of the failure by Judge Hinkes to follow a liberal approach to its cost study is his rejection of the original derivation of Borden's delivery costs (Appeal at 53). The calculations, based on "time standards" developed in 1949 from studies made of Bowman Dairy deliveries in Chicago and confirmed by additional work in the 1950's and 1960's, are summary in nature. Also, the underlying data necessary to conduct an effective examination of their reliability were destroyed (Order, Sept. 16, 1974). In addition, Robert Havemeyer, the author of the A&P studies, did not participate in the collection of the data nor in the preparation of the standards (Id. at 2).

32/ Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

Therefore, he could not be effectively cross-examined on the validity of the underlying data. 33/ For these, as well as other reasons, Judge Hinkes properly refused to admit the calculations. Id. This is not a matter of preferring one method of calculation over another. Judge Hinkes simply could not determine whether the calculations were even arguably reliable. Cf. FTC v. Standard Motor Products, Inc., 371 F.2d 613, 622 (2d Cir. 1967).

A&P's arguments concerning the relevance of the Wisconsin research (RX 9, 11) are adequately dealt with by Judge Hinkes (See I.D. 139-142). We note, however, our disagreement with the Judge's general rejection of standardized costs (I.D. 143). If it could be proven that standardized costs are reflective of actual costs--a showing not made in this case--then we would be willing to accept standardized costs as a substitute for actual costs. 34/

The studies are unpersuasive for numerous other reasons. For example, the studies did not consider the fact that a portion of Borden's expenses were incurred only in connection with its dealings with A&P (See citations in I.D. 157-160). Without a study of these costs, one cannot ascertain the true

---

33/ Havemeyer frequently was not helpful in describing the relationship of underlying data to the summaries. For example, when asked which study was not included in making certain observations, he stated, "I cannot tell you because the working papers . . . are no longer available." (Tr. 9130-9131).

34/ Even if the time calculations were acceptable, we would not find Havemeyer's calculations of delivery costs reliable. Some of the problems with the Havemeyer analysis are described in the initial decision (I.D. 144).

cost differences between the costs of handling the A&P account and the costs of handling the accounts of other purchasers (See Tr. 9422). See Rowe, supra note 19, at 287 ("It would be hard to defend a cost study which lacked internal consistency by resort to analytic reasoning with respect to one factor that would vitiate another."). Furthermore, the studies do not allocate costs according to the manner in which they were incurred (See citations in Complaint Counsel's Proposed Findings, Vol. II at 295-296), do not allocate overhead expenses according to accepted accounting principles (Id. at 296-297; see FTC v. Standard Motor Products, Inc., supra, 371 F.2d at 622), and inaccurately assign costs to certain customers (E.g., citations in I.D. 162).

But the most important task in evaluating the studies lies in ascertaining the credibility, intelligence, and experience of Mr. Havemeyer. Judge Hinkes found (I.D. 137) that Havemeyer did not base his studies on any personal knowledge of Borden's operations. Because Havemeyer was unfamiliar with Borden's operations and activities, he did not consider many relevant factors (See discussion in I.D. 146-152). In addition, Havemeyer did not review all of the available evidence to determine the completeness of his studies. For example, when asked if he made any check to determine if all loading expenses were included on a certain ledger, he stated he did not but added that his staff had made "some type of check." When asked about the type of check, he stated that he could not be specific (Tr. 7520).

His experience with Robinson-Patman cost studies was limited to preparation of a study for one other litigated case, United States v. Borden Co., 370 U.S. 460 (1962), in which the study was rejected by the Court because Havemeyer failed to classify stores adequately. Id. at 470-471.

A&P asserts that Judge Hinkes erred in finding that the studies failed to classify customers properly (Appeal at 55-56; see I.D. 154-155). The studies do, in fact, differentiate stores on the basis of "limited service" and "full service." However, it is clear that stores differ in terms of all types of expenses, including delivery expense, clerical expense, product waste, selling expense, credit loss, merchandising expense, and overhead. More important, the stores also differ in volume of purchases.

The Supreme Court in United States v. Borden Co., supra, criticized requiring cost justification on a customer by customer basis. 370 U.S. at 468. It tried to strike a balance which would permit group averaging where the group members were sufficiently alike especially "on the essential point or points which determine the costs considered" to make the averaging a reasonable indication of the cost of dealing with individual members. Id. at 469. We believe that the A&P classification makes some sense and could meet the Borden test although we are troubled by the volume differences between stores. See Foremost Dairies, Inc., 62 F.T.C. 1344, 1361-1362 (1963), aff'd, supra. However, we do not have to decide this issue because the studies are so fundamentally flawed. 35/

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel. Therefore, we find that A&P did not prove that the differential it received was cost justified.

IV. Count III: Combining To Stabilize Prices

Count III charged that A&P and Borden entered into a combination having the tendency or effect of stabilizing and maintaining retail and wholesale prices for milk and other dairy products. 36/ Judge Hinkes dismissed the count. Complaint counsel argue that Judge Hinkes applied the wrong standard of proof--that he did not view the evidence in the case *in toto* but looked at each part separately. According to complaint counsel (C.C. Appeal at 3-4, 7-8), Judge Hinkes required that each element of the conduct of the parties be sufficient to

---

35/ Similarly, we do not have to reach the question whether the studies are invalid because they determine cost for A&P stores on an average basis and compare this average with the specific costs of serving allegedly injured competitors (Appeal at 56-57; *see* I.D. 156). We note, however, that such a procedure could hide large discrepancies in size among A&P stores. And size, of course, is often related to cost differences. *See National Dairy Products Corp.* v. *FTC*, *supra*, 395 F.2d at 525-26, *aff'g* 70 F.T.C. 79, 193-196, 207 (1963). Finally, we also do not have to address complaint counsel's assertions that the studies should cover the entire discrimination period (*See* Complaint Counsel's Proposed Findings, Vol. II at 300-305). We think, however, that such a requirement is unduly burdensome.

36/ Although the count charges that the combination had a tendency to stabilize prices at both the retail and wholesale level, the thrust of complaint counsel's case is directed to the retail level aspect (*See* I.D. 179-187).

demonstrate the existence of an unlawful combination, contrary to the teaching of such cases as C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 494 (9th Cir. 1952).

Complaint counsel emphasize that the communications between A&P and Borden and the "needs" of these parties show that a combination took place (E.g., C.C. Appeal at 9, 18). 37/ Concerning the communications, we agree with Judge Hinkes (I.D. 199) that the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers or the price Borden would charge A&P's competitors, except to note that a price differential at the retail level between branded and unbranded products might create problems. Viewed together as well as separately, we do not find that the statements relied on by complaint counsel show that a combination to stabilize price existed. 38/ The statements do not in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level.

37/ Complaint counsel presented other arguments which we find unconvincing. For example, they note that the $820,000 savings was not made on any straight discount basis but spread by Borden over the 11 different product lines. Thereby Borden could influence A&P's retail price (Tr. 5233-5234). But as A&P's expert economic witness, Dr. Markham, stated (Tr. 7041-42), a distribution of cost savings among the various products was rational and in accordance with customary industry practice. In addition, each item was ordered separately on a demand basis, and therefore, a single price for one year's purchase of all 11 items could not be quoted (See I.D. 194).

38/ These include the "sensitiveness of the market (CX 12A)," the "depressed competitive situation (CX 18P)," and comments at the May 26, 1965, meeting between A&P and Borden (CX 19).

We also do not understand why A&P and Borden needed to enter into a combination to stabilize prices. Their pre- and post-agreement conduct show only that they were acting as economically rational businessmen. Although clearly adversaries in their negotiations--A&P wanting the lowest price possible and Borden the highest--both A&P and Borden were strongly motivated by independent causes to maintain existing dairy prices. 39/

A&P hoped that by switching to private label milk, it could obtain lower costs and increase its gross margin (E.g., Tr. 1400-1401). This was its whole purpose in negotiating the private label agreement with Borden, not passing lower costs on to customers to increase volume. We note that throughout the A&P-Borden negotiations, no provision was ever discussed for increases in volume of A&P's previous sales. We infer from this that the parties never contemplated that A&P would use its lower cost to lower price and thereby increase volume. Were A&P to lower its retail price, A&P would not achieve its immediate goal: to maximize profits (See Tr. 5230; 7038). Also, A&P feared that if it lowered

---

39/ The evidence submitted relating to market structure (See C.C. Appeal at 19-23) convinces us that A&P and Borden lacked the ability to stabilize prices (See Borden's Answering Brief at 31-37). Therefore, this evidence does not buttress complaint counsel's position that a combination took place.

the retail price of milk, Borden might be forced to give a similar wholesale discount to A&P's competitors. In addition, A&P was aware that the price it obtained from Borden cut Borden's profit margin to a point at which Borden might be driven out of the market if the prices that Borden charged decreased further.

Borden had recently completed building a large plant in Woodstock, Illinois and was willing to sacrifice some price to increase volume and thereby operate efficiently (Tr. 217, 5230). Especially, Borden needed to keep its major customer, A&P (See CX 42D). Borden did not want A&P to use a private label at all but was ultimately forced to offer to provide one. Borden then sought to minimize the substantial price concessions A&P requested. Unless such discounts were the only way to make use of idle machinery at Woodstock, Borden did not want to give other potential purchasers the same discount. 40/ However, if A&P charged a lower price on private label products and thereby precipitated a price war, 41/ Borden would be forced to extend the discount to others. Since Borden's dairy business was in a precarious financial

---

40/ In fact, because Borden probably wanted to increase volume, it considered offering the discount to others. Its counsel, however, advised Borden that such action would destroy Borden's meeting competition defense (Tr. 1076).

41/ Although, as noted, A&P and Borden lacked the ability to stabilize the market, A&P was large enough to start a price war.

position, such action could conceivably drive it to the point where it would have to withdraw from the Chicago market. Therefore, because it was in both parties' interest for A&P to maintain the prevailing price on its private label dairy products, there was no comprehensible reason for A&P and Borden to construct an illegal combination to achieve that end (See I.D. 199). We decline to construct one for them.

Of course, combinations having any tendency or effect of stabilizing prices are unlawful. See United States v. Container Corp., 393 U.S. 333, 336-338 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). Although complaint counsel has introduced only circumstantial evidence to prove the existence of a combination intended to stabilize the prices in a given market, we recognize that such evidence may well be sufficient. See Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939); Treasure Val. Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 208 (9th Cir.), cert. denied, 419 U.S. 999 (1974). The problem is that complaint counsel's circumstantial evidence provides more support for the proposition that both parties acted independently in deciding their pre- and post-agreement strategies than for the inference that they entered into an illegal combination. And, even if the circumstantial evidence here gives equal support to inconsistent conclusions, it is insufficient to establish liability. Pevely Dairy Co. v. United States, 178 F.2d 363, 370 (8th Cir. 1949), cert. denied, 339 U.S. 942 (1950).

We conclude that both A&P and Borden acted as rational and law abiding businessmen in this regard. See Callaway Mills Co. v. FTC, 362 F.2d 435, 441-42 (5th Cir. 1966). They did not need to engage in an illegal combination because maintenance of the retail price of milk was in the independent interests of each. "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743, 747 (N.D. Cal. 1959), aff'd, 322 F.2d 656 (9th Cir.), cert. denied, 375 U.S. 922 (1963). That A&P did not lower the price it charged consumers and that Borden did not immediately lower the price it charged its purchasers "should be deemed neither surprising nor illegal." North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265, 284 (E.D.N.C. 1974). Therefore, we reject complaint counsel's arguments and affirm Judge Hinkes' dismissal of Count III.

V. A&P's Due Process Claim

A&P asserts that it was denied due process of law by the Commission's delay in instituting these proceedings. It makes this claim as to all three counts. Because Counts I and III are dismissed, we respond to the claim only as it relates to Count II.

As early as February of 1967, A&P was informed that the Commission had commenced an investigation of its private label agreement with Borden and that the purpose and scope of the investigation was to determine whether an illegal price discrimination in violation of the Robinson-Patman Act and the Federal Trade Commission Act had occurred (See Affidavit of Richard A. Palewicz attached to Complaint Counsel's Answer to A&P's Motion to Dismiss, Oct. 20, 1972). At that point, less than 1 1/2 years after the agreement and less than 9 months after the renewed inducement, see note 27 supra, A&P was on notice of possible litigation, especially with regard to the Robinson-Patman Act. 42/ If A&P was, in fact, indifferent to this possibility of litigation, the Commission is not at fault. Certainly, A&P's lack of concern does not lead us to conclude that A&P was denied due process. In addition, we reiterate our position as stated in our Order Denying A&P's Motion to Dismiss, Jan. 19, 1973, that considering the complexity of this case as it was presented and argued by complaint counsel and A&P, the time taken to conduct the investigation leading to the issuance of the complaint in 1971 was not excessive. Id. at 4.

Because we have concluded that the delay in notifying A&P of the investigation and in bringing the complaint is not unreasonable, we do not have to reach the question of prejudice to conclude that A&P has not been denied due

---

42/ In 1966, the Justice Department initiated an investigation of the agreement to ascertain whether the agreement violated the order issued against Borden for discriminations in favor of A&P and Jewel Tea Company (Complaint Counsel's Answer at 3, October 20, 1972).

process. 43/ *United States* v. *Wilson*, 357 F. Supp. 619, 620 (E.D. Pa. 1973); *see United States* v. *Marion*, 404 U.S. 307, 324 (1971). However, because we invited A&P to renew this argument (Order at 5, Jan. 19, 1973), we address it now. We agree with Judge Hinkes (I.D. 213) that any prejudice that A&P has suffered from the passage of time is minimal and no more than that suffered by complaint counsel. Therefore, we reject A&P's claims.

VI. The Remedy

Since we have decided to dismiss Counts I and III, the final order refers only to the Count II violation. We have made three substantive changes in Judge Hinkes' order. First, the order states that in the future A&P has the burden of going forward with the meeting competition defense. Of course, this provision comes into effect only when A&P knows or has reason to know that prices offered to it are lower than those offered to others. We believe that such a requirement is not inconsistent with *Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 79 n. 23. *See American Motor Specialties Co.*, 55 F.T.C. 1430, 1466-67 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). 44/ As

---

43/ It should be noted that the cases defining unreasonable delay cited by A&P are criminal cases where, unlike the situation in an FTC proceeding, the Sixth Amendment and other restrictive procedures and safeguards are applicable. *See, e.g.*, *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1387-1388 (5th Cir. 1971); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969).

44/ The Court in *Mid-South Distributors* v. *FTC*, *supra*, 287 F.2d at 517, stated that the Commission has the burden of going forward with evidence to show that the buyer knew that

[footnote continued on next page]

demonstrated in this case, evidence that the seller's offer was made to meet a competing seller's offer is more readily available to the buyer than to the seller. Also, this new provision is not only reasonably related to the unlawful practice found to exist, see FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965); FTC v. National Lead Co., 352 U.S. 419, 429 (1957), but is, in fact, directly related. Borden stated explicitly that it was relying on the meeting competition defense to justify the price it quoted to A&P. A&P knew that Borden had, in fact, beaten the competitive offer yet did not communicate this to Borden. If it had, Borden might very well have withdrawn its bid. See Kroger Co. v. FTC, supra, 438 F.2d at 1376-77. We believe that this provision will render it substantially less likely that A&P will violate the Robinson-Patman Act in the future.

Second, the order requires A&P to distribute a copy thereof to A&P's suppliers of milk and other dairy products as well as to all of its operating divisions. By so doing, A&P will make suppliers aware that A&P is subject to an order that prohibits it from violating the Robinson-Patman Act. The notification requirement is also related to the

---

44/ (Cont'd)

the seller could not assert the meeting competition defense. Although we are not convinced that complaint counsel have this burden, we note that they assumed it and sustained it in this case.

Of course, the Commission can "forbid acts lawful in themselves . . . [or] compel affirmative acts of compliance" to restore and rehabilitate competitive conditions. Ekco Products Co., 65 F.T.C. 1163, 1216 (1964); see FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965). Therefore, even if this burden is more stringent than that described in Mid-South Distributors, it can be imposed on A&P as an exercise of the Commission's remedial powers. E.g., FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

unlawful practice. See FTC v. Colgate-Palmolive Co., supra; FTC v. National Lead Co., supra. The Robinson-Patman Act was enacted in large part to prohibit large buyers, especially chain stores, from using their purchasing power to pressure suppliers into granting unfair discounts. See, e.g., H.R. Rep. No. 2287, 74th Cong. 2nd Sess. 3 (1936); 80 Cong. Rec. 6621, 7324, 7887, 8104 (1936). The courts have also emphasized the need to prohibit pressure tactics from large buyers. E.g., FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960). The record in this case shows A&P exerted such pressure on Borden. Suppliers should be made aware that if A&P exerts similar pressure on them, such a practice is illegal.

Third, the wording of the cost justification proviso is changed to make it consistent with the holding in Automatic Canteen Co. v. FTC, supra, 346 U.S. at 74. 45/ Complaint counsel object to the wording of the proviso because it does not place upon A&P the burden of going forward with the cost justification defense. Pursuant to Automatic Canteen, id. at 79, we find that either the seller or complaint counsel (if the Commission has brought a Section 2(f) complaint) must retain this burden because both are better able to develop the relevant information than is the buyer.

45/ We concur with the Court in Mid-South Distributors v. FTC, supra, 287 F.2d at 520, that the Automatic Canteen Court's use of double negatives is "awkward." Nevertheless, we believe that such use conceivably makes the standard more restrictive than the positive approach, and therefore, we have decided to retain it in this order.

A&P objects to the order because it is nationwide in scope. We see no injustice in making the order nationwide. In finding the nationwide order appropriate, we have considered the frequency and duration of the violations, the business and competitive history of A&P, and the likelihood that A&P knew that it was violating the Robinson-Patman Act. See Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 789 (D.C. Cir. 1965). A&P's private label contract was the result of a nationwide program. It was initiated and supervised by A&P's New York dairy headquarters. This specific aspect of the nationwide program covered more than 200 A&P stores located in Indiana and Illinois, lasted for more than six years, and resulted in substantial discriminations against competitors of A&P. The purpose of A&P's program was to increase its gross margin on milk products, an extremely important line, and thus to improve its overall gross profit position.

Complaint counsel object to the order because it does not include all products purchased by A&P for resale. Although we find some merit in the position that the conduct challenged in this case related to A&P's entire business and that A&P could conceivably evade the order by turning its attention to other products, we cannot ignore the realities of the kinds of negotiations that go on with respect to a company with thousands of stores dealing in tens of thousands of products. We also note that only A&P's dairy headquarters was involved in this contract. Although we believe that an all products order could be enforced, see FTC v. Ruberoid Co., supra, 343 U.S. at 473; Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946); Foremost Dairies, Inc. v. FTC, supra, 348 F.2d at 681-82, we have decided to exercise our discretion and limit the order to milk and other dairy products.

We reject A&P's claim that "it is impossible to infer that, unless an order is entered, A&P will hereafter engage in the conduct alleged in the Complaint." (Appeal at 71). As noted, the purpose of A&P's program was simply to increase its gross margin on milk and other dairy products and thereby to improve its overall gross profit position. If merchandising methods now being relied upon by A&P to increase revenues fail, A&P might very well again feel the need to pressure small dairies to give A&P an unlawful discount and thereby increase its gross profits.

We also reject the contention that this case is stale. Cf. Columbia Broadcasting System, Inc. v. FTC, 414 F.2d 974, 981-82 (7th Cir. 1969), cert. denied, 397 U.S. 907 (1970). In fact, A&P did not terminate its relationship with Borden until 1972, four months after issuance of the complaint and five years after commencement of the investigation. 46/ The dairy and retail food industries have not drastically changed in the last few years.

46/ A&P states that it terminated arrangements with Borden because it was offered lower prices by other dairy suppliers (Appeal at 1 n. 2).

Finally, we note that, although not specifically mentioned in the order, A&P is still entitled to all statutory defenses in any subsequent action enforcing the order. See FTC v. Henry Broch & Co., 368 U.S. 360, 366-67 (1962); FTC v. Ruberoid Co., supra, 343 U.S. at 475-76.

Thus, for the foregoing reasons, we find that A&P violated Section 2(f) of the Robinson-Patman Act. We, therefore, enter the appended order.

April 29, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

-----------------------------------x

THE GREAT ATLANTIC & PACIFIC :
TEA COMPANY, INC.,
:
Petitioner,
: **PETITION FOR REVIEW**
v.
: 76-
FEDERAL TRADE COMMISSION,
:
Respondent.
:
-----------------------------------x

The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby petitions this Honorable Court to review the Final Order of the Federal Trade Commission ("FTC") entered in FTC Docket No. 8866 dated April 29, 1976 and served on A&P on May 27, 1976, and to set the same aside insofar as it is adverse to A&P.

Dated: July 23, 1976
New York, N. Y.

Respectfully submitted,

Denis McInerney

Denis McInerney

Attorney for Petitioner,
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P.O. Address:
Cahill Gordon & Reindel
80 Pine Street
New York, N. Y. 10005
(212) 825-0100

P R O C E E D I N G S

JUDGE HINKES: The hearing will be in order.
Mr. Soeffing, you may call your next witness.

MR. SOEFFING: I call Harry L. Archer to the stand as the Commission witness this afternoon.

- - -

HARRY L. ARCHER was thereupon called as a witness for the Commission and, having been duly sworn, testified as follows:

JUDGE HINKES: Your full name, please.

THE WITNESS: Harry L. Archer.

DIRECT EXAMINATION

By Mr. Soeffing:

Q Will you state your home address for the record?

A 331 Country Club Drive, Box 3533, Tequesta, Florida.

Q Mr. Archer, are you presently employed, sir?

A I am not.

Q When you were last employed, sir, what was the name of your employer?

A The Borden Company.

Q And when did you leave the Borden Company, sir? What year?

A January, 1968.

Q At the time you left the Borden Company, sir, what was your title there?

A I was Vice Chairman of the Board.

1072

Q And what were your responsibilities, sir, if you could give us a general description in that position?

A Primarily administrative responsibilities to our real estate holdings and our building in New York and that sort of thing.

Q How long did you hold that position, sir?

A Approximately a year and a half.

Q So you assumed that position sometime in 1966?

A That is right. No. 1967.

Q 1967.

A Yes.

Q And when you assumed that position, sir, what was your prior title?

A Executive Vice-President.

Q What were your duties as Executive Vice-President, sir?

A I had the responsibility of our milk and ice cream division, our foods division, and our Canadian operations.

Q How long did you serve in that capacity?

A Approximately three years.

Q Prior to that position what other position did you hold?

A I was President of the milk and ice cream division.

Q What were your responsibilities in that capacity, sir?

A I had the responsibility of all our milk and ice cream operations throughout the U.S.

Q You left that position when?

A I think actually it was September of 1966. I earlier stated 1967, but I think I was elected to that in 1966, September.

Q When were you President of the ice cream division, between what years?

A In 1960 through 1963.

Q And in 1963 you became Executive Vice-President?

A Right.

Q Who replaced you when you left the position as President of the milk and ice cream division.

A J. B. Pentz.

Q Is he also known as Jack B. Pentz?

A That is right.

Q Did you have any title prior to 1960 with the Borden Company?

A Yes. Prior to that I was General Manager of the ice cream division, and assistant to the President of the ice cream division, and that was about it. I came to New York in 1951.

Q What did you do in the position that you last described to us?

A I assisted the vice-president who had the total responsibility of our ice cream division.

Q Now you stated that when you left the presidency of the milk and ice cream division that you were replaced by Mr. Jack Pentz?

1074

A Right.

Q When he replaced you do you know what his responsibilities were?

A Yes. He had the same responsibilities that I have so indicated, the responsibility of the milk and ice cream operations throughout the U.S.

Q So his responsibilities were similar to yours?

A Identical.

Q Now when you served in these various positions, sir, for Borden, what was your business address?

A Well, from 1951 on it was 350 Madison Avenue. The prior seven years I was in Pittsburgh. The prior seven years in Muncie, Indiana, and from 1927 until 1939 I was in South Bend, Indiana.

Q Now you told us that up until approximately 1963 you were president of the Milk and Ice Cream Division?

A Yes, that is right.

Q Could you describe for us the structure and organization of the Borden Milk Ice Cream Division when you headed it, sir?

A Yes. It was made up of ten, or eleven, or twelve divisions and districts throughout the United States. We had operations in practically all parts of the United States excepting the Northwest, and each of those divisions or districts are headed by either a district chairman or a president of the division. And it was their responsibility to keep me informed

***

Q Did Borden at that time own, operate, and maintain distribution depots throughout the United States for the distribution and delivery of milk?

A Yes.

Q Do you know about how many there were of those?

A No, I don't.

Q Can you give us an order of magnitude, some sort of an approximation?

A It would only be a guess on my part at this time. I presume that there was probably 100.

Q And the Milk and Ice Cream Division where you were President, and later when you were Executive Vice President, did Borden carry a relatively full line of milk products throughout its divisions throughout the country?

A Yes.

Q Mr. Archer, you stated previously that you did have contact with officials of the Chicago Central District both in your position as President of the Milk and Ice Cream Division, and later on in your position as Executive Vice-President because of a transitional phase.

A Right.

Q Did there come a time in possibly 1964 when you learned of private label negotiations going on between Borden and the Great Atlantic & Pacific Tea Company in the Central District?

A I was aware of that.

Q How did you first become aware of it, sir?

A I think I became aware -- I just don't recall the first instance.

Q When is the first instance that you do recall someone telling you that these negotiations were taking place?

A Well, I think there was a time that Mr. Minkler informed both Mr. Pentz and myself that the Chicago Central Area of the A & P were considering private label.

Q And how did he do this?

A I am not certain as to that, but I rather suspect that there was a letter or correspondence pertaining to it.

Q Do you remember any correspondence dealing with private label negotiations, let's say in the latter part of 1964?

A I can't pinpoint the date. I rather suspect that that is true if that is what you are dealing with.

Q Mr. Archer, I would like to show you Commission Exhibit 5A and 5B, already received in evidence, and I would like to ask you to please familiarize yourself with that and examine it. And I would appreciate it if in addition to the body of this letter which is typewritten, you would also acquaint yourself with the handwritten notations at the top.

A All right.

Q I would also like to give you a copy, Mr. Archer, of Commission Exhibit 6A through 6C, which has also been received into evidence, and ask you to familiarize yourself with that, please.

Have you finished with those, sir?

A Yes, I think so.

Q Do these documents which I have handed you, sir, refresh your memory as to any events which might have occurred regarding the private label negotiations in the latter part of 1964?

A Well, I do recall, since reading this letter, dated November 20, that that must have been about the time that the private label was initiated by our Chicago Central people. I am aware primarily because of what I am reading now. I must confess that I didn't recall the contents of this prior.

Q I understand what you are saying, sir. Does this document refresh your memory in any way as to any actions you may have taken in the latter part of 1964 after receiving the letter?

A No, it doesn't. At some point in time here -- and I am not at all certain that it was with this letter or at this time -- I was aware of the interest at headquarters of A & P, of course, and with my contact over there, Mr. Herschel Smith, I conveyed to him figures that were intended to be a part of what was going on in the local area of Chicago with local A & P officials and our own people out there,but I can't describe for you that these figures which you have given here in this exhibt are what I conveyed to Mr. Smith or not.

Q I understand that, but at some point in time, probably in latter 1964, you did meet with Mr. Herschel Smith?

A Yes. I had several meetings with him.

MR. McINERNEY: Excuse me, Mr. Sceffing. I would just like the record to show in the answer previous to last, the document that the witness was referring to was Commission Exhibit 6A and 6B, if that is satisfactory, and CX 6C.

JUDGE HINKES: Very well.

By Mr. Sceffing.

Q You stated that you met several times with Mr. Herschel Smith. Who was Herschel Smith employed by?

A The Atlantic & Pacific Tea Company.

Q Do you know what his title was?

A He was a buyer primarily, I believe, of dairy products in the purchasing department.

Q And you said you had several meetings with Herschel Smith, is that correct?

A Yes. Over the years I had several meetings with him.

Q Well, speaking particularly now of these private label negotiations which emerged from the Chicago Central District, when was your first meeting with Mr. Herschel Smith concerning this?

A I don't recall. I'd just have to use conjecture to the best of my ability. Obviously I would say that our Chicago people being informed by his Chicago people of their interest in private label, that our Chicago people informed me, and either suggested or asked, or possibly on my own I took the

A Are you still talking about 16A?

Q That is correct.

A Yes.

Q 16A and B?

A Yes, I would identify that as Mr. Pentz' handwriting.

Q Mr. Archer, you have stated at one point that you did have a meeting with Mr. Herschel Smith of A & P and that you did leave something with him. Can you remember at this point any meetings subsequent to that meeting with Mr. Herschel Smith?

A Oh, yes. I don't recall any exact meeting, but I know that over a period of time that I had various contacts with Mr. Smith about various parts of the country and our operations and so forth. Now, are you referring specifically to the Chicago situation?

Q Yes, I am.

A I can't recall anything that took place after the one occasion that I mentioned.

Q After that one meeting?

A That is right.

Q Do you remember any discussions or any internal considerations regarding the private label negotiations which might have occurred on or about May of 1965?

A No, I don't.

Q Mr. Archer, I am going to hand you a document subtitled Commission Exhibit 222 for identification and ask you to

***

reading on this memorandum as to its effect on income.

Q But it doesn't give you any independent recall of any events which might have happened then?

A No, it doesn't.

Q You don't remember anything about 42H either, the handwritten notes of Mr. Pentz?

A No, I don't. I have just indicated to you that I do recall -- and I couldn't recall the exact figures, but I know that Mr. Pentz was quite concerned at that time as to the effect that might take place on the gross income out there if this business was lost.

Q What did Mr. Pentz tell you as to the effect which it might have out there?

A He sent this memorandum over to me. That is all I am recalling.

Q So you do remember getting this memo?

A No, I don't. I am looking at it right here.

Q All right.

Forgetting this memo for a moment and any of the documents you have before you, do you remember any discussions which you mig have had about this time with Mr. Pentz in which you discussed the effect of the private label negotiations on the gross income of the Borden Company in the Chicago Central District?

A No, I don't.

Q I rehand you, Mr. Archer, Commission Exhibit 42A through

***

your presence ever discuss with any A & P Representative the price at which A & P intended to, or would, or should sell private label products out-of-store in the Chicago area?

A No, sir, never.

Q Was there ever any discussion during that time period, either in your presence,or as far as you know, concerning the price at which A & P would sell Borden label products out-of-store in the Chicago area?

A No, sir.

Q Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P?

A Would you repeat that question so that I can understand it?

(The record was read by the reporter as follows:

"Question: Again, using the fall of 1964 as a reference point, Mr. Archer, did you or did any Borden Representative in your presence ever discuss with A & P the fact that Borden would not or did not intend to pass on at the wholesale level to customers, other than A & P price reductions, similar to the reductions granted to A & P?")

THE WITNESS: The answer is no.

MR. WHITE: That is all, Your Honor.

JUDGE HINKES: Mr. McInerney.

By Mr. McInerney:

Q Mr. Archer, I believe you told us that you had a number of contacts with Herschel Smith with respect to selling Borden products to A & P in various parts of the country at various times, is that correct?

A Yes, that is right.

Q To the best of your knowledge, apart from whatever may have happened in Chicago, can you recall any situation, with the possible exception of Chicago, in which A & P gave Borden an opportunity to rebid or resubmit a quote to A & P after A & P had received competitive offers?

A No.

Q Insofar as you are aware, would A & P expect Borden to quote its best price the first time, and in other words, not give Borden ---

MR. SOEFFING: Your Honor, I will object to that question. He said "would expect." I think that is asking the witness to make a guess. I think he should ask him what the practice was.

MR. McINERNEY: I am talking about a course of dealings.

JUDGE HINKES: Ask him with respect to a course of dealings. Ask him what the practice or policy was, or something of that sort.

By Mr. McInerney:

Q In general, wasn't it the practice of A & P that Borden would only be able to submit one price and would not get a second bite at the apple if that price was not a competitive one?

A Yes, I think you are right. Please keep in mind though that you are asking -- I would have to withdraw my answer. You are speaking of two different levels of responsibility, and this -- at the New York level, we just didn't have that type of conversation, so that any response to your direct question that I give you would have to be at our local level, and I could only deal with the policy that we have in our own company.

Q I am just asking you as a general matter and as matter of practice, Mr. Archer, wasn't this generally A & P's practice?

A Yes, that is right.

Q And insofar as you are aware, with the possible exception of Chicago, that was regularly followed?

A That is right.

Q You did have some discussion with Mr. Herschel Smith -- correct me if I am wrong -- with respect to private label milk in New York prior to the advent of this Chicago negotiation?

A Yes, indirectly.

Q Do you recall that Borden made an offer for private label milk to A & P for the New York area?

A Yes, I know that it was made.

Q And do you recall that the price quoted in New York was based on the price of raw milk plus container costs, processing charges, and delivery charges?

A I am not aware of the detail on it.

Q In the hope of refreshing your recollection, although the document has been admitted in evidence, I would like to show you Commission Exhibit 23-A, the bottom of the page, and I would like to ask you to read a paragraph commencing "examination of similar costs in Metropolitan New York."

If you would just read that one paragraph down to the end of the quotation.

My question is, sir, whether reading that helps to refresh your recollection that there were prices quoted in New York based on the price of raw milk plus a container cost, processing charge, and delivery charge?

A No, it really doesn't.

Q Do you know in general what the spread between the price of raw milk and the price that Borden charged A & P for the private label milk in New York was?

A No, I am not familiar with that figure.

Q Do you know whether the price of raw milk in New York was lower or higher than in Chicago in 1964 and 1965?

A I can't tell you taht.

Q With respect to the private label offer in Chicago, did you or did anyone in your presence tell Mr. Smith or anyone from A & P that the private label prices being offered to A & P in Chicago were not cost justified?

A I am not aware of that.

Q Did you or did anyone in your presence tell Herschel Smith or anyone from A & P that the private label prices being offered to A & P in Chicago would not be made available to others on proportionately equal terms?

A I am not aware of that.

Q Do you recall discussing the subject of availability of those prices to others with Herschel Smith?

A Never.

Q Do you recall a discussion with Mr. Smith concerning the final quotation that was submitted to A & P in early October, 1965? I believe the record shows the date is approximately October 1, 1965.

A I had no conversation with Herschel Smith with reference to that.

Q Without pinpointing the specific date, sir, do you recall any conversation with him at around that time, perhaps after that time, with respect to this private label quotation in Chicago?

A No, no, I do not.

Q Do you believe that Herschel Smith or anyone from A & P misrepresented anything to you, or to anyone from Borden during these negotiations for private label milk in Chicago?

A I can only answer a portion of your question. I can say with all candor and honesty that Mr. Smith never did to me. It would be just pure conjecture on my part to answer the latter part of this question.

Q I am only asking you all of these questions, sir, insofar as you are aware.

A All right. I am not aware.

Q Do you know whether Borden made private label milk offers to other customers in Chicago, other than A & P, in 1964 or thereafter?

A I believe the record will show that they did.

Q And were the prices quoted to the other private label customers similar to those quoted to A & P?

A I am not aware of that.

Q You have no knowledge either way?

A No.

Q Sir, you have been shown a number of notes which you identified as being in the handwriting of Mr. ~~Mentz~~ Pentz, and which appear to be from the desk pad of Mr. ~~Mentz~~ Pentz. As to several of them, you said that that was the first time you had ever seen them. My question is, do you recall having seen any of those handwritten notes before?

A No, I don't, unless my initials appeared on them. If you would go back over them and find my initials there, I would have to agree that I had some knowledge of it in passing at the time, but if my initials did not appear there, I would have to say that I did not recall ever seeing any of them.

Q As a general practice, unless your initials appeared as a recipient of the note, is that the idea?

A That is what I am trying to say.

Q In other words, the fact that Mr. Pentz may have written a note -- I don't have it in front of me -- that H.A. did something with H.S., that would not be an example of where you might have seen the note?

A That is right.

Q Apart from the instance you have described, would you have any independent recollection of having received any of these notes?

A Yes, I think I so testified that I did see several of these notes when they were shown me.

Q I was trying to do this en masse, but as I recall, the one that you said that of was a typewritten memorandum on which you had written the word "agreed" or some such thing.

A That is right, "agreed" and "good."

Q Is that the one that you are speaking of?

A That is it.

Q Are there any others that you can recall?

A Not that I recall.

Q Is it possible that on the ones where your initials may appear and have been crossed out, that Mr. Pentz was writing to himself ---

MR. SOEFFING: I am going to object to that, Your Honor. He said "is it possible?" I think we should find out what the usual course of practice is, not is it possible.

JUDGE HINKES: I would have to sustain that objection. The answer would not have any probative value, because I think everything is possible.

By Mr. McInerney:

Q Mr. Archer, were any of the handwritten notes that we are speaking of, which are entirely handwritten notes from the calendar pad of Mr. Pentz apparently, did you instruct Mr. Pentz to prepare any of those?

A No, I did not.

Q Mr. Archer, I would like to show you two letters dated October 1, 1965, which have been marked respectively RA and PX-2 and RA and PX-3. Would you please look at those?

A Does this mean this was attached?

Q Yes, it has been testified.

A I have never seen that before.

Q You have never seen RA and PX-2, which is apparently a letter from Mr. Tarr to Mr. Schmidt, is that correct?

A Yes, this would appear so.

Q But is it your testimony that you haven't seen it before?

A That is right, I have not seen it before.

Q Have you seen similar letters, letters similar to that?

A I have not.

Q When A & P would receive a price quotation from Borden, can you tell us whether it was a practice for Borden to give A & P some kind of a letter of assurance as to the legality of the prices that Borden was offering A & P?

A Yes, I believe that it was, and I think that it was so written or typed on the proposal. I believe that I am correct in that.

Q And is the kind of assurance that you were just speaking of an assurance similar to that contained in RA and PX-2?

A I can't testify ---

MR. SHEFFING: Your Honor, I must object to that. He has already testified he has never seen these letters before quite emphatically.

JUDGE HINKES: I will overrule the objection. Let the witness answer. Is the assurance the same type that this letter ---

MR. McINERNEY: Or similar, Your Honor.

THE WITNESS: Yes, I think I would respond in the affirmative to that. I presume that there were some instances of State laws that would change the wording in some fashion, but I am not sure of that either.

By Mr. McInerney:

Q Did you ever advise Mr. Smith that Borden's private label quotation in Chicago was made for the purpose of meeting competition and would not be made available to others?

A I never did that.

Q Did you ever have a discussion with Mr. Smith about the Woodstock plant, the new plant that Borden had constructed in Woodstock, Illinois?

A I don't recall specifically, but that Woodstock plant was, of course, a matter of record and a part of very prominent news in the dairy magazines, and so forth, and so forth, and Herschel was interested in that sort of thing, because they were thinking of some processing plants of their own; so conceivably yes, but to the best of my knowledge, no.

Q In 1964 and 1965, they did not have any processing plants of their own, is that correct?

A The Tea Company?

Q Yes.

A You are speaking of milk? They had an icecream plant in Wiscons[illegible], but no milk to my knowledge. No, I don't believe so.

Q Co[illegible]ssion Counsel showed you a document which has been marked Commission Exhibit 7-X, and I appreciate, of course, that you won't remember the numbers, but that referred to the Woodstock plant as the largest and most modern in the world. Was that well known at that time in 1964 and 1965?

MR. SOEFFING: Your Honor, I am going to object to that because I think that is a "when did you last meet your wife"

***

***

MR. SCHWENG: No further redirect, Your Honor.

MR. WHITE: I have a few more questions, Your Honor. I am trying madly to find an Exhibit.

By Mr. White:

Q Mr. Archer, did A & P build a milk processing plant to serve its stores in Pennsylvania?

A You say did they?

Q Yes.

A Yes, they did.

Q Do you know about when they announced that they were going to build that plant?

A No, I can't tell you that.

Q Mr. Archer, I show you Commission Exhibit 153-A, and I direct your attention to the line down in the righthand corner that starts out "these prices." Can you read that?

A "These prices are available to all on a proportionately equal basis."

Q Yes. You were asked by Mr. McInerney whether you had ever seen language similar to PA and PX-3, I believe it is. Is that the right number?

MR. McINERNEY: two.

By Mr. White:

Q Is that the language you had reference to, sir?

A Yes.

MR. WHITE: Thank you. That is all.

***

Testimony of Albert Banaski

***

MR. CURNIN: Objection, your Honor. This is cumulative testimony. We had this testimony from the witness who was called last week, who told us about the practice and his experience, and we were told this witness was going to be called for the purpose of identifying contracts.

MR. STONE: I will withdraw the contract.

JUDGE HINKES: The question has been withdrawn.

BY MR. STONE:

Q How many days did Bowman deliver milk to stores in the Lake and Porter Counties?

MR. CURNIN: Objection, your Honor.

MR. STONE: This witness' summary states he will testify as to milk distribution and days of delivery in Lake and Porter Counties. The fact that he is going to testify about other matters does not make this the subject of his witness summary inadmissible.

MR. CURNIN: I object to this testimony as cumulative. It is a lengthy record as it is.

JUDGE HINKES: I don't know how many other witnesses covered this particular aspect of the case. I don't think a second witness is necessarily objectionable on the basis of being cumulative. If it went on much further perhaps we could entertain an objection, but at this point, no. I will allow the questioning to continue.

***

A Yes.

Q I think it is 298, 299 and 300.

Was the commission as negotiated considered part of the total wage package as paid to the drivers?

MR. STONE: I object to the form of the question, your Honor.

MR. CURNIN: I will withdraw the question.

BY MR. CURNIN:

Q Pursuant to the terms of these agreements, the wholesale drivers were paid both a salary and a commission?

A Right.

Q In addition, they received other monetary benefits, did they not, such as health plans and the like, which were considered part of the benefits to be negotiated and hopefully obtained on their behalf?

A Yes.

Q These benefits that were obtained, and I am talking now in terms of monetary benefits, both the commission and the salary and these other benefits, wage and health plans and the like, were they considered as part of the total monetary package that the union drivers would receive?

A Yes.

Q Did these agreements provide there would be a limit on the amount of total compensation that could be received by union drivers who were working on wholesale?

MR. SCHAEFER: Pardon me, your Honor, could we have that answer reread

JUDGE HINKES: Certainly.

(Question read.)

By Mr. Palewicz:

Q To the best of your knowledge, Mr. Barnes, can you ever recall A & P ever leading off on a price reduction on milk in the Hammond area during either of the two periods mentioned?

A Not to my knowledge.

Q In the conduct of your business, Mr. Barnes, how important is purchase price to your company -- to your store in relation to your ability to compete?

MR. CURNIN: Objection, your Honor, unless we're talking about milk and dairy products.

MR. SCHAEFER: Same objection.

MR. CURNIN: Also, your Honor, I think it's this witness' testimony that he is involved in the purchasing of meats only.

JUDGE HINKES: No, I'll overrule the objection. I'll let the witness answer.

Within your knowledge, how important is the purchase price?

THE WITNESS: Within my knowledge, well, pretty important, because it determines what --

MRS. URLAUB: Could you please speak up?.

THE WITNESS: I said fairly important because it determines what you can sell the product for and the amount of profit you'll make off it.

By Mr. Palewicz:

Q Do you consider discounts or rebates of one or two percent on any product to be important?

A Yes.

Q Why do you consider them important?

A It's just that much added profit for us that we can make.

Q Mr. Barnes, how important is milk to your store operation?

A It's one of your leading -- leading things.

JUDGE HINKES: Try to speak up a little.

THE WITNESS: I'm sorry. It's one of your leading things in the store. People are conscious of milk.

By Mr. Palewicz:

Q Are there any other reasons besides being one of the leading things in the store why milk is important to your operation?

A As a drawing power, that's all.

Q Now, when you say "Drawing power", what do you mean?

A Well, if you're competively ~~prices~~ priced to -- the people will buy milk at your store, and they'll come in to pick up the milk, they might buy other stuff.

Q Are discounts and rebates on milk and dairy products important to your operation?

A Yes.

Q Why are they important?

A Because it helps determine how low we can be with our price.

Q Mr. Barnes, are you familiar with the term "Leader" as used in grocery merchandising?

A Yes.

Q What does it mean?

A It's an item that will be priced low to help draw the people into your store.

Q Was milk sometimes used as a leader in your market area during the time periods mentioned?

A Yes.

Q Did you ever use milk as a leader?

A Yes.

Q During the periods October, '66 through March, '67, and June, '69 through November, '69, were you familiar with your store's dairy purchasing practices?

A Yes.

Q How did you become familiar?

A Dad and I went together on it.

***

MR. PALEWICZ: All right. I'll reread the question for the record.

By Mr. Palewicz:

Q Mr. Barnes, how were you billed by the Borden company during the periods October, '66 through March, 1967, and June, '69 through November, '69 on milk and dairy products?

A Weekly.

Q During the stated periods, did you receive any rebates or discounts from the Borden company off of the invoice price on milk and dairy products?

A Yes.

Q What was the nature of the rebates or discounts?

A It was a percentage rebate on the purchases for the month.

Q How often were they paid?

A Monthly.

Q How were they paid?

A By check.

Q When would a rebate for a particular month be made?

A Shortly after the end of the month.

Q Did you receive more than one rebate check per month on milk and dairy products?

A No.

Q Did you also purchase ice cream from the Borden company during the periods mentioned?

A Yes.

Q Mr. Barnes, did you receive any loans from the Borden company during either of the periods October, '66 through March, 1967, or June, 1969 through November, 1969?

A Yes.

Q Did you repay the loan?

A Yes.

Q Did you pay interest on the loan?

A Yes.

Q Did you receive any equipment in connection with your purchases of milk and milk products from the Borden company during either of the stated periods?

A No.

Q During the periods stated, did you receive any promotional aids from Borden?

A Yes.

Q And what kind of promotional aids did you receive?

A Advertisement.

Q What type of advertisements were these?

A Poster, what have you, shelf talk signs -- shelf talkers.

MR. CURNIN: May I have that read back, your Honor?

(Answer read.)

[***

your store during the stated periods?

A Six days.

Q Where did they put the milk?

A Most of it went in the cooler. Some they would haul out to the dairy case if we were low on a particular item out there.

Q Did the Borden driver ever put milk in the dairy display case during either of the two periods?

A Not to my knowledge.

Q Did the Borden driver ever rotate milk in the dairy display case during either of these two periods?

A Not to my knowledge.

[***

that you were not there and did not observe what the Borden driver was doing?

A On sometimes, yes.

Q And sometimes you did. But most times you did not?

A Probably about 50-50.

Q Now, did the driver rotate the stock in the cooler?

A Yes.

Q During this period of time, did you receive special deliveries from the Borden company?

A If we'd run out of something or that, would they bring it out, yes.

Q Did you pre-order your milk and dairy products, or was that handled by the driver when he arrived at the store?

A The driver came, but Dad gave him the order.

Q How did you pay your, I believe you said a weekly bill?

A Yes. By check.

Q Was it handled by check?

And was that something that was determined as the driver arrived at the end of the week, he'd total up the bill and then the bookkeeper would make a check for him?

A No. We got a statement from Borden's, and we sent the check to them.

Q Did Borden assume the risk of loss if there was any spoilage in their products?

A Yes.

Q You testified earlier this morning that you did receive advertisements and posters from the Borden company on their milk and dairy products, and then you also referred to self-talk signs.

By that do you mean point of sale display cards and signs and banners?

A Yes, right. Little -- the cards for on the dairy case and so forth.

Q Right. You mount them right on the dairy case.

A Right.

Q And during the '66-'69 period, were you visited by the Borden sales force, Borden representatives?

A Yes.

Q And would they review with you any problems that you might be having at that time?

A Yes, if we had any.

Q And might they also be bringing in some promotional material to drop off with you and -- and so that you would have handy in the store?

A If they had something, yes, that we wanted.

Q In addition to this loan which you received from Borden which made it possible for you to open the store, did you also have an equipment loan with Borden?

A Yes.

Q And was that for the purchase of an ice cream cooler?

A No, it was a frozen food cooler.

Q Frozen food cooler.

And what was the frozen food cooler used for? In other words, what products were in there, sir?

A Any of the frozen foods that were brought in.

It was not an open case. It was a walk-in case in the back room that was used for storing frozen foods and ice cream.

Q Frozen foods and ice cream?

A If we had any surplus that didn't sit in the counter, we kept it there, yes.

Q They would go into this walk-in cooler in the back?

A Yes.

Q And did you obtain this loan from Borden which enabled you to open up the store and this loan on this walk-in cooler all as part of your overall dealings with the Borden company in regard -- in addition to those, to your purchase of milk and dairy products?

A They were two different times. The loan was given first, and then a while after we were in, we purchased the cabinet through them.

Q Right. But that was all and parcel of your overall dealings with the Borden company?

A Yes.

Q Did you purchase an ongoing business, sir, or was the business closed at the time you purchased it in July of --

A It was going at the time.

Q It was an ongoing business?

A Yes.

Q And what -- what dairies were serving the store at that time prior to your purchase?.

A There was Dixie and Borden's.

Q And after you got the loan from Borden and opened up the store, it was all Borden?

A Yes.

Q And that was part of the understanding or arrangement that you had with the Borden company?

A Well, it was just that we were going to take in their milk, that's all, and ice cream.

Q Now, you mentioned this Dixie Dairy.

Were other dairies operating in the Hammond area during this period, '66 to '69?

A Yes.

Q Can you name them for us?

A I can't name all of them. I know Dixie was operating in there. Now, the other ones, I'm not sure.

Q Was Dean operating in the area?

A I'm not sure.

Q What about Wanzer?

A That I'm not sure of, either.

Q Can you name any of the other dairies who were operating in this area, sir?

A No, sir, I can't, not at that time.

Q During the period '66 to '69, were you approached by any other dairies in an effort to get you to take on their milk and dairy products?

A Not that I recall, no.

Q Would that have been something that would have been discussed with you, or would they have contacted, in the main, your father?

A They would have contacted both of us.

Q And you don't have any recollection of any dairies coming in to see you during that period of time?

A Not that I recall, no.

Q Were you ever told by Borden that you would receive an extra discount if you accepted the risk of spoilage?

A No.

Q Were you ever advised by Borden during this period of time that you would receive an extra discount if you did the pre-ordering?

A No.

Q You mentioned promotional allowances which you received from the Borden company during this period of time.

Did Borden run promotional allowances on dairy products on almost a weekly basis during this period?

A I believe it was pretty close.

Q And these weekly rebates on dairy items were important in the operation of your business?

A Well, yes, to have a promotional item, yes.

Q It would help to build traffic in the store?

A Yes.

Q Now, during the period 1966 to '69, did the amount of the rebate that you received from the Borden company increase, as best you can recall?

A I thought we had -- I thought we had a fairly even keel on our milk. I'm not sure. I'd have to look at the records and find out.

Q Do you recall during this period of time your asking Borden for an increase in the rebate payment, which they then gave you?

A Could I have the dates on that period?

Q During the period 1966, when you opened, through

***

Q And can you tell us who, or did they all at various periods of time use it as a leader?

A Yes.

Q In other words, during the period '66 through '69, at various periods of time A & P on Sohl, National Cash, Burger, Jewel, and Tittle used it as a leader?

A Yes, if they . . .

Q Thank you -- did you want to add --.

A If the Burger store was over there at that earlier date, then they --

Q They used it as a leader?

A Yes, because the other store had the same price, too.

Q Did A & P's introduction of the sale of private-label milk during the period of '66 through '69 injure your business?

A Not to my knowledge.

Q Mr. Barnes, you've mentioned this $40,000 loan from Borden.

Were you paying off that loan throughout the period June of '66 through November of '69?

A Yes, sir.

MR. CURNIN: No further questions, your Honor.

JUDGE HINKES: Mr. Schaefer.

MR. SCHAEFER: May I ask, prior to my

REDIRECT EXAMINATION

By Mr. Palewicz:

Q Mr. Barnes, did you or your father rotate the stock in your dairy case?

A I never did -- well, I can't say I never did, but most of the time he would check over the . . .

Q How much out of date products did you return to the Borden company?

MR. CURNIN: If he knows, your Honor.

MR. SCHAEFER: And with a time period, your Honor.

MR. PALEWICZ: All right.

By Mr. Palewicz:

Q During the time periods mentioned earlier, which is from October, '66 to March, '67 and from June, '69 to November, '69, to your knowledge, how much out of state -- out of date products did you return to the Borden company?

A I have really no real idea of how much.

Q During the same periods of time mentioned, how often did you get special deliveries from the Borden company?

MR. CURNIN: Again, your Honor, if he knows.

JUDGE HINKES: Yes. You understand --

By Mr. Palewicz:

Q If you know.

JUDGE HINKES: -- in any question, your answer has to be based upon your personal knowledge or experience.

THE WITNESS: There wasn't but a few times, your Honor, that I recall that we got a special delivery from them. But it was available to us if we run out.

JUDGE HINKES: Very well.

By Mr. Palewicz:

Q To your knowledge, and also during the stated time periods, how often did the Borden salesmen call upon you at the store?

A I'd say about at least once a month, twice a month, anyway.

Q During your cross examination by Mr. Curnin, you mentioned a second loan for a frozen food cabinet that you received from the Borden company.

A Yes.

Q Did you repay that loan?

A Yes.

Q To the Borden company?

A Yes.

Q Did you pay interest on that loan?

***

operations of your stores?

A Yes.

Q Now, restricting ourselves, Mr. Barney, only to the years 1966 through 1970, and those years only, how many stores did Model Food Center, Inc., operate?

A Two.

Q And can you give me the locations of each of these stores?

A 7440 Calumet Avenue in Hammond, Indiana, and 300 West Sibley Boulevard, Dolton, Illinois.

Q Now, restricting ourselves not only to the period 1966 through 1970, but only to your Hammond store with respect to all of our questions, during this period did the Hammond store purchase milk from Borden's?

A Yes.

Q And did it purchase from Borden's from 1966 up to or through part, at least, of 1970?

A Right.

Q At least through March of 1970?

A Yes.

Q Now, Mr. Barney, are you familiar with the City of Hammond and the Hammond area in Indiana?

A Oh, yes.

Q And approximately how many A & P stores are there as a total number in the Hammond area?

1110

A I believe there were four.

Q In the 1966-through-'70 period?

A Right.

Q And do you know where those stores were?

A There was one in Munster; one in Hessville -- I think they call it Hessville; there was one on Homan Avenue in Hammond, and one other. I can't remember the street right offhand, near one of the schools, near Hammond Tech High School, I believe, in kind of a shopping center, but I, I can't -- Sohl Street, I believe.

Q Sohl Avenue?

A Sohl Avenue, yes.

Q Would that refresh your memory?

A Yes.

Q So there is one at Sohl Avenue; there is one in Munster. Would that be at Ridge Road?

A Yes.

Q One on Homan?

A Yes.

Q And would it refresh your memory if I told you, or if I asked --

MR. CURNIN: Your Honor, why doesn't he just ask the witness the questions? He is refreshing the memory ,and the witness hasn't indicated he has a lack of memory.

JUDGE HINKES: Ask the witness.

By Mr. Soeffing:

Q May I refresh your memory --

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: There is no indication that the witness has suffered from any lack of memory, Mr. Soeffing.

MR. SOEFFING: Very good, your Honor.

By Mr. Soeffing:

Q Now, Mr. Barney, does your store in Hammond, Indiana, or did it during the period I mentioned, '66 through '70, draw customers from the areas in which the A & P stores were located?

A Sure.

Q And can you give us some kind of terms of distance, from approximately what distance your customers came from the Hammond area?

A Well, a great percentage would have come from the area within approximately a three-mile radius.

Q Would many have come from any further distance than that?

A Yes, I would say that we, we have had customers from as far as 15 or 18 miles.

Q Did A & P advertise regularly in the area in which your store in Hammond was located --

1112

A Yes.

Q -- during the period '66 through '70?

MR. CURNIN: Your Honor, may we note a continuing objection to what I assume is a new line of questioning involving general advertising, or general competition, if not limited to milk and dairy products?

JUDGE HINKES: Yes, your objection is noted.

MR. SCHAEFER: Same objection, your Honor, if we may.

JUDGE HINKES: Very well.

By Mr. Soeffing:

Q And how did A & P advertise?

A Hammond Times.

Q Did you advertise in the Hammond area regularly in the period 1966 --

A Every week.

Q Through what media did you use?

A The Hammond Times.

Q How often did you advertise?

MR. CURNIN: Asked and answered.

THE WITNESS: Weekly.

By Mr. Soeffing:

Q How much did A & P advertise?

A At least every week, and I am not positive that -- that they might have advertised more than once a week, but I can't be sure.

Q Did A & P sometimes feature ~~daily~~ dairy products in its advertisements?

A Sure.

Q Mr. Barney, did you regularly compare your prices with those being charged by your competitors, including A & P?

A Always.

Q How did you do so?

A Actually visit the stores.

Q Of your competitors?

A Right.

Q Did you use a comparison shopper service?

A No.

Q Now, when you made these price checks of your competitors, did your checks include the prices on milk and dairy products?

A Always.

Q Why did you compare your prices with the price of your competitors on milk and dairy products?

A It happens to be one of the more important items in a supermarket, and we were, always wanted to be aware of what other people were charging for these items.

Q To the best of your knowledge, Mr. Barney, can you ever recall A & P leading off on a price reduction on

1114

milk in the Hammond area?

MR. CURNIN: Your Honor, may we have this in point of time?

MR. SOEFFING: '66 through '70.

JUDGE HINKES: Unless otherwise indicated, all of his questions are limited to that period of time.

MR. CURNIN: May I have the question read back?

THE WITNESS: I do, too, because I forgot it now.

(Question read.)

THE WITNESS: May I have some qualification on it?

Am I allowed to ask for some qualification?

JUDGE HINKES: Of course.

MR. SOEFFING: Sure.

THE WITNESS: Are you talking specifically milk, or are you talking dairy products?

By Mr. Soeffing:

Q I am talking milk.

A Milk as such?

Q Right.

A I am not sure. That I cannot be sure of --

Q You do not recall --

A -- milk as such.

There were things like half and half and cottage cheese, and those kinds of things I am sure of. Milk specifically I am not sure of.

Q Mr. Barney, in your opinion, did you compete with the A & P store or stores which you have previously described for us?

A MR. CURNIN: Objection, your Honor; no foundation.

MR. SOEFFING: Your Honor, the man is general manager of the store.

JUDGE HINKES: The objection is overruled.

THE WITNESS: Definitely.

By Mr. Soeffing:

Q What is the basis of your opinion?

A Our competition is every store that is within our trading area.

Q Mr. Barney, how important is purchase price to your company with relation to your ability to compete?

MR. CURNIN: Continuing objection.

MR. SCHAEFER: Objection.

JUDGE HINKES: The objection is overruled.

THE WITNESS: It's very important.

By Mr. Soeffing:

Q Do you consider discounts or rebates of one or two percent on any product to be important?

A Absolutely.

1116

Q Why -- why do you consider it important, sir?

A Well, in the specific case of milk and dairy products, we happen to buy a great deal, a great volume of milk and dairy products; between our two stores, in the area of $40,000 a month, and one or two percent happens to be a lot of money.

Q Of that amount, approximately how much do you purchase in your Hammond store per month?

A Between 15 and 18.

Q Thousand?

A Thousand.

Q Dollars?

A Yes.

Q Has it been your experience in the course of your duties that consumers shop often for milk?

A Oh, yes.

Q Are they generally familiar with milk prices?

MR. SCHAEFER: Objection, your Honor.

MR. CURNEN: Objection.

MR. SCHAEFER: There is no foundation laid, no indication of whether, or how the witness has any information on this subject.

JUDGE HINKES: Yes, you will have to establish the witness' knowledge.

MR. SOEFFING: Be happy to, your Honor.

1117

By Mr. Soeffing:

Q Mr. Barney, do you talk with the people who shop in your store from time to time?

A Yes.

Q And do they talk to you about prices of your competitors, and your own prices?

A At times, yes.

Q And at times do these include the prices on milk?

A Almost always.

MR. SCHAEFER: Does the witness understand the time period that we are talking about, that I would --

JUDGE HINKES: Let's be sure.

MR. SCHAEFER: At least Complaint Counsel should use the past tense in his questioning.

By Mr. Soeffing:

Q Have you talked with people during the period 1966 through 1970 on these matters?

A Oh, certainly.

Q Now, Mr. Barney, thus has it been your experience that the consumers shopping at your stores are generally familiar with milk prices?

A It has been my experience, yes.

Q Now, you told us -- are there any other reasons why milk is important besides the volume of purchases by your consumers, or your customers?

A Well, it just happens, it happens to be in -- if I am allowed an opinion, a -- probably one of the three or four main items in a supermarket are our dairy products, our meat products, our bakery products. These are things that people shop regularly.

Q Mr. Barney, what effect would it have on your business if you sold milk at a price higher than that charged by the large corporate chains?

A We would soon hurt our business terrifically.

Q Are you familiar with the term "Leader"?

A Yes.

Q What does it mean to you?

A It could mean one of two things, either the items that we advertise are a noticeably good value when we advertise in the paper, which can be considered a leader, or those items that we have regularly shelfed priced at a price that is a noticeably good balue to a customer.

Q And is milk sometimes used as a leader in the Hammond market area?

MR. CURNIN: Objection, your Honor, getting here with a whole host of hypotheticals. I ask that we determine from this witness what, in fact, happened during this time period.

JUDGE HINKES: The question is whether milk was a leader in this area at the time that we are speaking of. I don't know that we can get any more specific than that -- or did you have something else in mind?

MR. CURNIN: That is not -- I did not understand that to be the question, your Honor.

May we have the question read ?

JUDGE HINKES: Let's have the question read back.

(Question read.)

JUDGE HINKES: Now the objection once again?

MR. CURNIN: He didn't ask him whether or not milk was used.

JUDGE HINKES: Yes, that is about the only suggestion I might make. You might use the past tense to indicate we are still talking of the period '65 to '70.

MR. SOEFFING: No, '66, your Honor.

JUDGE HINKES: '66 to '70. Excuse me.

MR. SOEFFING: Yes, sir. Your Honor, I am sorry.

By Mr. Soeffing:

Q Mr. Barney, was milk sometimes used as a leader in your market area in the period 1966 through 1970?

A Yes.

Q Mr. Barney, were you familiar, in your position with the, with Model Food Center, Inc.'s, dairy purchasing practices in the years 1966 through 1970?

A Definitely.

Q And did your Hammond store purchase from Borden only, or did it purchase from Borden and someone else?

A Borden and Dean.

Q And approximately how much shelf space was devoted to the Borden product, and how much to the Dean product?

A As near a possible, 50 percent each.

Q How, sir, if you can describe for us, was Model Food Center, Inc., at least with regard to its Hammond store, billed by Borden?

A Net.

Q This is in the period June '69 through March of 1970?

A That was billed net.

MR. SCHAEFER: Now, your Honor, if we are going to separate out the questions as to '69 and '70, then I object to them insofar as they relate to count three

My understanding was with respect to questions about the entire period, that only the period up through '68 would relate to count three.

MR. SOEFFING: Your Honor, we understand that.

JUDGE HINKES: Well, just for the record, then, let's have it clear that the questions relating to the period '69-'70 are not applicable to count three.

1121

MR. SOEFFING: It is clear in my mind, your Honor.

JUDGE HINKES: Very well.

MR. SCHAEFER: Thank you, sir.

By Mr. Soeffing:

Q Now, you state that you were billed net, and I asked you if you were billed net for the period June, 1969, through March of 1970, to the best of your knowledge.

A To the best of my knowledge that is the way we were billed in respect to the Hammond store.

Q That is correct.

A Okay.

Q Now, again with respect -- and was that billing on a, on what kind of a basis was that billing?

A Weekly.

Q It was done weekly.

Now, for the period October, 1966, through March of 1967, how was your Hammond store billed by Borden?

A To the best of my knowledge it was billed on a net basis, plus an allowance for gallons, and specifically gallons, and that doesn't mean gallonage, but gallon, gallon product, gallon milk product.

Q So you received some kind of an allowance on gallons only?

A Right.

Q And on what kind of a basis was that, if you remember it?

A Four cents a gallon, I believe it was.

Q Now, those -- these cents off payments, how often were they paid?

A Monthly.

Q And when were they paid?

A Oh, product delivered this month would be paid next month, somewhere in the area of the 15th or 18th of the month, or something like that.

Q So for example, a payment for October would probably be paid sometime in November?

A In November; yes, sir.

Q During these periods did you also purchase ice cream from Borden?

A Yes.

Q Mr. Barney, did you ever receive any free equipment from the Borden company during the years 1966 through 1970?

A Relative to what? We received -- we have -- we had some equipment relative to ice cream.

Q In the Hammond store?

A One in each store, as the case may be.

Q Did you receive anything else in connection with milk for your Hammond store?

A No.

Q The answer is "No"?

A No.

Q What did you receive, if any, in the way of promotional aid for your Hammond store with regard to milk and dairy products?

A Well, I am not sure I understand the question as to promotional aids. Could be promotional flyers, or this kind of stuff which was available, but which we seldom used, or are you referring to possibly lesser prices on promotional, things that we promoted?

Now, we -- we did receive some things, some allowances, promotional allowances on things that were advertised in the paper.

Q Were these milk and dairy products?

A Dairy products, not milk.

Q Did you receive these often?

A Assume -- relatively every time we advertised a product at a lesser price than our regular shelf price we had some allowances allowed us.

Q And in relation to your total milk and dairy products were these advertising allowances relatively large or relatively small?

***

show the out-of-store price charged for these milk and dairy products?

A No, sir.

Q It's your testimony that you purchased both milk and dairy products from Borden as well as ice cream during this entire period '66 to '70?

A I believe that is correct.

Q All right.

And that in connection with the ice cream side of it, you received equipment, and also a loan?

A That is correct.

Q And was that part and parcel of your entire dealing with Borden? In other words, your purchase of milk, dairy products, and ice cream?

A No, sir.

Q Why not? Was it something separate and distinct?

A It was separate and distinct for ice cream, period.

Q But I realize that the equipment and the loan were with relation to ice cream; my question to you, sir, however, is this: Was the receipt of the loan and the receipt of the equipment, and in fact, the receipt of ice cream, part and parcel of your entire dealings with Borden? In other words, the purchase from Borden of milk, dairy products, and ice cream.

A I am not sure I understand what I am supposed to answer to that question.

I -- I am not sure what you -- what you really expect me to say.

Now, not that you expect me to say anything, but I --

Q I don't know what you are going to say, Mr. Barney.

A That is right, but I am not sure I understand exactly what you mean.

Q In other words, so that the --

A We -- we bought milk and ice cream from Borden.

Q Right.

A And in the process of buying the milk and ice cream we got this equipment and the loan.

Now, other than that I can't -- I can't say anything else about it.

Q All right.

A I can't make something out of it that it isn't.

Q No, and I don't want you to, and that answers my question.

A Okay.

Q I am going to be asking you a series of questions about these tax returns, Mr. Barney, and so I will place them before you.

A Yes.

Q In addition to her approving advertising, what did she do?

A (No response.)

Q Was she involved, for example, in any of the buying side of the business?

A We most often during, for example, during our conversations with any dairy company, we would have sat down together, all three of us.

Q And how many of those conversations did you have during the period 1966 to 1970?

A Oh, it's hard to say. I listen to anybody that wants to talk to me.

Q You mean you listen to any dairy that wants to talk to you?

A That's right.

Q And were you approached frequently by dairies --

A Oh, certainly.

Q -- during this period '66 to '70 --

A Yes.

Q -- for your business?

A For our business?

Q Yes.

A Oh, yes.

Q And did they offer you prices as good or better

40 than Borden's?

A Most of the time better, but not, not the type of product that I would like to sell.

Q And can you identify these dairies for us?

A No, I can't right offhand. They were nondescript, so to speak.

Q But you would sit down and discuss that with the owners, the fact that you have received an offer from a nondescript company that you were not interested in carrying?

A That's right.

Q And how many of these conversations about nondescrip dairies did you have with the owners?

A I have no idea.

Q Frequent or infrequent?

A I can't call them frequent because I don't -- I don't -- I don't have a visit from a new dairy every week.

Q No. In fact, you had few visits from new dairies?

A I had relative few, yes.

Q All right.

One a year?

A Oh, no, no, no. Much more than that.

Q Twice a year, sir?

A No. Maybe five or six times a year.

***

A -- or do you -- I can't be specific.

Q Right.

A I can give you an idea, but I can't be specific.

Q If I should ask you that question for each of the returns in '66 -- rather, '67, '68, '69 and '70, would your answer be the same, that you cannot tell us how much of that item of expense is allocable to the Hammond store?

A Not from looking at this, no, I can't.

Q Were you at any time during the period 1966 to 1970 supplied milk by a supplier other than Borden?

A Yes.

Q Who was your other supplier during this time period?

A Well, it might have been two, or it could have been just Dean. Dean for sure was one of them, and we might have had Kraml, but I am not sure. I can't recall exactly when Dean replaced Kraml.

Q It may have been during this period '66 to '70?

A It could have been, but I am not positive.

Q During the period '66 to '70, you had two suppliers in your Hammond store?

A Right.

Q And how much of the dairy case did they have, sir, the two suppliers?

A Equal.

Q Borden had 50 percent and Dean and/or Kraml had 50 percent?

A Correct.

Q Now, how did the price that you were paying Dean compare to the price that you were paying Borden?

A Lower.

Q Dean had a lower price?

A Um-hmm.

Q What?

A Yes.

Q What about the amount you obtained from Kraml?

A Oh, I can't recall it right offhand. This goes -- it might have not even been there at that time. This could conceivably go back ten years.

Q When you were --

A I am not sure.

Q When you were being served by Kraml?

A Right.

Q And did there come a time in 1970 when Dean became your sole supplier?

A In 1970?

Q In 1970.

A I would say not, because Borden was replaced with Wanzer.

Now, there might have been a day or two days or something --

Q No. Well, let's --

A -- like that.

Q Borden was replaced by Wanzer in 1970?

A Well, whenever it happened. I think it was in 1970, April, or something like that, April 1, or whenever, somewhere in that -- I can't recall the specific date.

Q You identified an A&P store in Munster, Indiana, as having been a store that was in or near your store, and is that the one on Ridge Street?

A Ridge Road.

Q Ridge Road?

A Um-hmm.

Q How far away is that store from your store, sir?

A Approximately a mile; maybe less.

Q And I am not sure that I, my notes are correct, but you mentioned another store in that area, Hessville?

A Hessville, yes. After thinking, it's 156th Street in Hessville.

Q How far away from you is that store?

A Oh, it must be in the area of three miles.

Q And the Homan Avenue store of A&P is how far away?

A Two miles.

Q And the A&P store on Shoal Avenue?

***

deliveries from Borden on milk and dairy purchases?

A That I couldn't tell you.

Q Who would know that?

A Our store manager.

Q And to what point in the store was the milk delivered?

A Delivered to our cooler.

Q Is that a cooler that you could get into from the outside of the store, or did you have to --

A No, you had to come in the store.

Q Into the store.

And did the driver deposit the milk and the dairy products in the cooler?

A Correct.

Q And would he rotate the stock in the cooler?

A That was my understanding. Whether he actually did or not, I can't be that certain.

Q But your understanding is that he did it?

A Um-hmm. Could be different.

Q But it's your understanding that he did, is it not?

A It was our agreement.

Q All right.

They were supposed to, under your agreemtnt?

A Right.

Q Did the driver ever place milk and dairy products into the dairy case?

A That again is something that we had agreed that they would do.

Q All right.

And he would rotate the stock?

A Now, since I was not actually there, I can't tell you whether he --

Q You can only tell us on the basis of your understanding, --

A That's right.

Q -- and the agreement that you had.

A (Nodding head.)

Q And would they rotate the stock?

A Supposed to.

Q Were your stores visited by Borden salesmen?

A Stores?

Q Stores.

In other words, was your Hammond store visited by the salesman, was your Dolton store visited by the salesman?

A Most of the time any visits from Borden were for me, and they were at my office.

Q And your office happened to have been --

A Is in Dolton.

Q -- located in Dolton?

A Right.

Q But the visit of the salesman would concern Bordens overall dealings with you, including their dealings with you at your Hammond store?

A That's right.

Now, that doesn't say that they did not visit the Hammond store. That I have no way of knowing.

Q They may have visited the Hammond store as well?

A They could have.

Q Did you receive point-of-sale advertising, or promotional material from Borden?

A I am sure it was available; whether we actually used it or not, I can't tell you.

Q Did you ever have demonstrators in your store from Borden?

A Regarding what?

A Regarding Borden's milk and dairy products.

A Not to my knowledge.

Q Did you have any demonstrators in your store in Hammond after it had been remodeled in '68, I believe it was, at the time of its reopening?

A Not to my knowledge.

Q Did Borden, at that time, supply you with any -- what I will refer to as new store opening specials or materials?

7ds6

A Could very well. Could very well have.

Q It was their practice -- it was the Borden's practice at this time to do so, was it not, sir?

A I believe that's correct.

Q And did you receive free merchandise from Borden during this period of time?

A Oh, I don't know about that.

Q What about in connection with the remodeling and reopening of your Hammond store?

A I don't think that we received anything free. We might have had a spacial allowance given to us on a certain product, but I don't recall having received free merchandise.

Q Did you receive an advertising allowance from the Borden Company during this period of time?

A Yes.

Q And how much was that, sir?

A It varied on the product.

MR. SOEFFING: Now --

By Mr. Curnin:

Q And did you receive weekly specials from the Borden Company during this period of time?

A Borden put out a, as I can recall, put out a schedule of promotional items --

Q Which --

***

7ds14

Q Did Borden offer you private label milk during this period of time?

A I don't know.

Q Did Dean Milk Company offer you private label?

A I couldn't tell you that. I really don't know.

Q Did Wanzer offer you private label?

A Not that I know of.

Q Did Wanzer seek to get your business during the period '66 to '70?

A Yes.

Q When did they first seek to get your business?

A It goes back a few years. I can't really recall how long ago.

Q As early as 1967, sir?

A I would say so.

Q And did they offer you prices that were comparable to Borden at that time?

A At least, yes.

Q And, in fact --

A I would not change for comparable prices.

Q And in fact they offered you prices that were slightly better than Borden's at this time?

A If, in order to change, they would have to have been better.

Q And they did make such an offer to you at that time?

A I would say so.

Q During the period 1966 to 1970 did you ever see a -- withdraw that.

Were you ever told by Borden at any time during the period 1966 to 1970 that you would receive an additional one percent discount if you would assume the risk of spoilage?

A Not to my knowledge.

Q Were you advised at anytime during the '66 to '70 period by Borden that you would receive an additional one percent discount if you would do the preordering?

A Not to my knowledge.

Q Were you buying glass and paper from Borden during the period '66 to '70?

A You are talking about gallon product?

Q Yes, sir.

A Glass and paper?

Q Glass and paper.

A Chances are, yes.

Q Is your store open five or six days a week, sir?

A Seven.

Q And what are its hours?

A In Hammond?

Q In the Hammond store, sir, during the period '66 to '70.

***

let's strike the last question and answer regarding the personnel, and restate your question.

MR. SOEFFING: Sure.

By Mr. Soeffing:

Q Did you have personnel which rotated the cases in your store?

A Yes.

Q Now, you stated that Borden would accept certain spoilage.

How much out-of-date merchandise did the Hammond store have?

MR. CURNIN: If he knows, your Honor.

MR. SOEFFING: If you know.

JUDGE HINKES: If you know.

THE WITNESS: Relatively small. I cannot give you a dollar amount.

By Mr. Soeffing:

Q Now, Mr. Barney, Mr. Curnin questioned you about the fact that Wanzer may have offered you a better price, or made a better offer than Borden. Was this the offer which you finally accepted when you changed to Wanzer?

A Yes.

Q When was that?

A (No response.)

Q The approximate year.

817

A 19 -- I believe it was in 1970, but I -- I can't be all that positive.

MR. SOEFFING: That is the extent of our redirect, your Honor.

JUDGE HINKES: Mr. Curnin.

RECROSS EXAMINATION

By Mr. Curnin:

Q The offer, however, of Wanzer was initially made in 1967, was it not, sir?

A I don't know exactly, but it was sometime prior to --

Q It was several years prior to the actual change?

A Yes, that is definitely true.

MR. CURNIN: Thank you, sir. I have no further questions.

MR. SCHAEFER: No questions.

FURTHER REDIRECT

EXAMINATION

By Mr. Soeffing:

Q Was this the exact same price offer?

MR. CURNIN: Your Honor, I believe that the witness has already testified as to that question, and if there is any doubt about it, then I ask that complaint counsel's question to this witness be reread, and we have this answer. I think it has been asked and answered.

JUDGE HINKES: Well, let's reread that. I can't say that I can remember the exact language.

Can you find that, Ernie?

THE REPORTER: Frankly, your Honor, I really don't know which question and answer he wants.

JUDGE HINKES: You are referring to the answer to your question?

MR. CURNIN: No, the answer given to Mr. Soeffing's question.

JUDGE HINKES: Let's go back to that.

(Desired portion of record read.)

MR. CURNIN: Asked and answered, your Honor.

JUDGE HINKES: Well, I am afraid I can't quite agree with you, Mr. Curnin; when the question says, "Was this the offer," what is the "this"?

I am not so sure that I understand.

MR. CURNIN: Well, read my question and answer to the witness.

JUDGE HINKES: Yes.

MR. CURNIN: Then I think it will be clear, your Honor.

(Whereupon, the requested portion of the record was read.)

MR. CURNIN: Let me ask the witness this question, your Honor, --

JUDGE HINKES: We have reached Mr. Soeffing at this point, and with the state of the record as it is, I see no reason for not clarifying this offer and price, so that we are all sure of what we are talking about.

Instead of leaving it to conjecture as to what the witness may have meant, I am going to allow the question and we will hear the answer.

Will you get the last question of Mr. Soeffing?

(Question read.)

By Mr. Soeffing:

Q Perhaps I can clarify that for you, Mr. Barney.

You told us that you accepted this Wanzer offer later on. You said something about several years earlier.

Were the prices that were conveyed to you by Wanzer several years earlier the exact same prices that you finally accepted later on in 1970 or '71, or whenever you said it was?

A Not necessarily. They -- they could have been different, subject to the time that it happened.

MR. SOEFFING: That is the point I wanted to get across, your Honor.

No further redirect.

FURTHER RECROSS EXAMINATION

By Mr. Curnin:

Q My question to you, Mr. Barney, is this, that taking the '67 Wanzer offer, was that comparable to the offer which you received and accepted in 1970 in terms of price?

A Comparable, yes.

MR. CURNIN: Yes. Thank you, sir.

I think that dispels any confusion.

MR. SOEFFING: No further questions from us.

JUDGE HINKES: Very well.

Thank you, Mr. Barney. You are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. CURNIN: Your Honor, as to Monday morning --

JUDGE HINKES: Do you want this on the record?

MR. CURNIN: Yes, let's go off the record.

JUDGE HINKES: Off the record.

(Discussion off the record.)

MR. SOEFFING: I call Mr. Paul Peters.

- -

PAUL G. PETERS, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

JUDGE HINKES: Would you state your full name, Q Are you retired?

A Yes, sir.

Q And what was the place of your last employment, sir?

A Chicago, Illinois.

Q And with what company, sir?

A Great Atlantic and Pacific Tea Company.

Q And are you on a retirement pension from that concern?

A Paid for by the concern. The annuity policy is from the Prudential Insurance Company.

Q When were you last employed by A&P, sir, in Chicago?

A Well, I left the office on April 17th, 1970.

Q And just prior to leaving in April of 1970, what was your position with the A&P Company?

A I was Purchasing Manager of the Chicago Division.

Q And how long did you hold that position, sir?

A From beginning the previous March, about 13 months.

Q That would be March 1969?

A March 1969. March 1st, 1969.

Q And prior to March 1st, 1969, what had been your position with the A&P Company, if any?

A From 1964 until the end of February 1969 I was Director of Purchases, of the Middle Western Division.

Q I think Mr. Schmidt has already testified that approximately this period of time, in 1969, that there was a change in the divisional group in A&P, and I take it that as of

March 1st, 1969, the Middle Western Division was dissolved and what had been the Chicago Unit now became the Chicago Division. Is that correct, sir?

A That is correct.

Q And do you recall what month in 1964 you became the Director of Purchases for the Middle Western Division, sir?

A I believe it was the latter part of August.

Q August of 1964?

A August or the early part of September.

Q Now, prior to becoming the Director of Purchases for the Middle Western Division in August or September of 1964, had you been employed by the A&P Company?

A Yes, sir.

Q And what was your position prior to that time, sir?

A I was Unit Buyer in the Chicago Unit, as the terminology existed at that time.

Q And how long had you held that position, sir?

A From December of 1960.

Q And I take it this was the position that was later occupied by Mr. Elmer Schmidt after you became Director of Purchases of the Division.

A That is correct.

Q Now, as Unit Buyer, were you the head of purchases for the Chicago Unit during this period from 1960?

A Yes, sir.

Q Was that prior to or subsequent to this message, sir?

A I believe it was the next morning.

Q And what was the nature of that conversation, sir?

A Well, I wanted to be sure I understood what he was talking about, and other than this particular message. And basically that was about it. I may have at this time expressed my opinion that I thought it might be too early to generally go out and solicit bids because we as yet didn't know whether we wanted or -- or as I understood it the Chicago Unit hadn't actually decided whether they wanted private label milk.

Q Had you at any time prior to this occasion discussed the question of private label milk for the Chicago Unit or the other Units under your control with Mr. Smith?

A Yes.

Q On what occasion was that, sir?

A I believe at a meeting in New York, along about November or December, I believe it was one of the topics that were discussed.

Q This was November or December of 1964, sir?

A That's right.

Q And in what manner was this discussed at that meeting?

A Well, as I recall it, I think he had information on the arrangement he had made for private label milk, I believe in New York, or not he had made but somebody had made, I believe in New York, and it was a suggestion that perhaps all

Purchasing Directors should look into it for their particular areas.

Q And did he provide you with information for your consideration concerning the nature of the private label arrangement in New York?

A Yes. I can't recall whether it was at that meeting or subsequently.

Q And was there any discussion of private label programs that A&P Units in other parts of the country might have had in effect, at this meeting?

A No, frankly, I don't recall any.

The one sticks in my mind, though, but I don't recall whether there was any on the others or not. There may have been some comments from some of the other Purchasing Directors, but I can't recall.

***

A I believe it was in early February, before the 15th of February, 1965.

Q That was shortly after this message from Mr. Smith?

A That is right, yes.

Q And who was involved in these contacts?

A Mr. Schmidt.

Q Now, generally speaking, throughout the course of the negotiations, who handled the negotiations between A&P and whatever, and whatever dairies were contacted concerning the supply of private labels.

A Mr. Schmidt.

Q And for the record's sake, when you speak of Mr. Schmidt, you are talking of, S-c-h-m-i-d-t, rather than the first?

A Well, I should say Elmer Schmidt.

Q Elmer?

A Maybe I should use the first name.

Q Now, during the course of the negotiations, did Mr. Smith, or did Mr. Schmidt, rather, Elmer Schmidt, report to you upon the developments as they occurred in the course of the negotiations?

A Yes, or within a short time after he had had an opportunity to analyze them.

Q But you were kept informed as to the developments in the course of the negotiotions?

A Well, I was informed as to the progress, not necessarily

BEST COPY AVAILABLE

all conversations or developments, but he would tell me when he got a quotation and he would tell me what he didn't get in 'it, and thattype of thing.

Q Did you have frequent meetings with Mr. Schmidt during the period February, 1965, concerning the course and conduct of the negotiations?

A Well, they were not meetings, actually. They were when he might tell me that well, I still don't have this or I got this today, and I will pass it on to you tomorrow or the next day or something of that nature.

It was not where we sat down and talked about it. I mean, after all, we are in the same building on the same floor and probably 30 feet apart from one another.

Q You were in very close proximity to each other?

A That is right. Maybe 30 feet is too short; maybe I should have said 70 or 80 feet.

Q In fact, you were in daily contact with one another?

A Yes. In fact, to go to the washroom, I had to walk past his department.

Q Mr. Bartels, I hand you Commission Exhibit 23 A through I, 24 A through F -- or 24 A through G; 25 A, 26, 27, and 28 and ask you if you have seen these documents before, sir.

A 23 A, B, C, D, E, F, G, H, and I, I have seen that one before.

Q And was this presented to you, Mr. Bartels, by Borden.

personnel?

A Yes.

Q And do you recall which Borden officials presented it to you, sir?

A Well, there was Mr. Malone, and I believe Mr. Minkler. I am sure Mr. Minkler was there, but I am not quite sure whether Mr. Tarr was there or not.

Q But at least Mr. Minkler and Mr. Malone were present at this meeting?

A Yes. But there was somebody else, there were three people.

Q Is this the one meeting you had at which Mr. Malone was present at the negotiations?

A Yes.

Q And you don't recall the approximate date of that meeting?

A I can't recall. It was in, I believe, probably the early summer, late spring or early summer of 1965.

Q Now, Mr. Bartels, I hand you Commission Exhibit 34 for identification and ask you if you can identify this document, sir.

A Yes.

Q And what is it, sir?

A Well, it is in my handwriting, indicating the summary of one subject of conversation with Herschel Smith on August 11.

Q And on this date then, you had had a telephone conversation with Mr. Smith?

A Yes.

Q And this is a notation you made during the course of that or following that telephone conversation?

A That is correct.

Q I note in the second, the last two lines of the note, it is stated also send him info from Borden on comparative costs. Do you have any recollection as to what information is referred to in this sentence, sir?

A No, I don't. I can't recall what that is.

Q Is it possible that this would have been, or, correction, would reading Commission Exhibit 23-A, or looking through Commission Exhibit 23 A through I, refresh your recollection in this regard, sir?

MR. McINERNEY: In regard to whether it is possible?

MR. MATHIAS: No, I didn't ask him about any possibility.

MR. McINERNEY: Well, maywwe know what the question is, Mr. Mathias, I am not sure I understand it.

MR. MATHIAS: I will rephrase the question, rather than having it reread.

By Mr. Mathias:

Q Mr. Bartels, does the reading of Commission Exhibit 23-A through -I refresh your recollection as to what is meant by the notation on CX-34 also send him info from Borden on comparative costs?

A No, it doesn't.

Q Are you familiar with any other information which you received from Borden concerning comparative costs?

A I don't recall any. This New York, I think, was the only one that I recalled.

Q Now, do you recall whether or not you did send him information on comparative costs, that is, with Herschel Smith?

A I know I did not send him this.

Q That is CX-23?

A That is right. I know I did not send him that. But again, as I can't remember what that referred to, I may have sent him something but I am sure it wouldn't pertain to this subject. I think I would remember that.

Q Now, Mr. Bartels, can you recall anything else that occurred in this conversation with Herschel Smith on August 11? Did you receive any other instructions from Mr. Smith?

A Well, I can't recall any.

Q Did you discuss the question of receiving additional bids on your private label business inthat conversation?

A Obviously we did, because that is what my notes said that he suggested that we, which we have previously talked about, he suggested that now we go ahead and do that if we wanted to.

Q All right. Now, you have mentioned a previous suggestion. When did this previous suggestion occur?

private label milk and daily products and the commencement of service by Borden there if any check was made to see whether or not the prices granted to A&P had been made available to competitors in the area of the Chicago unit?

A I did not make a check.

Q Do you know whether or not at this time in late 1965 and 1966 Borden sold private label to anyone else in the Chicago market area?

A I don't know whether they did or not.

Q I believe, Mr. Bartels, yesterday you stated that you became unit buyer in the Chicago unit in 1960.

A Yes, sir.

Q You served either with the Chicago unit or the Middle Western Divison or the Chicago Divison from that period of time until the end of your employment with the A&P, is that correct?

A That is correct.

Q Now, who were the major chain store competitors in the Chicago area during the period 1964, 1965?

A Well, Jewel Tea Company was far and wide the largest and national tea company, among the chains.

Q What other chains were major chains in the area?

A I can't remember the names. Some of the smaller ones, Kroger had stores in Chicago at that time.

Q Would they have been smaller than A&P?

in the interim period. I believe I should be allowed to explore this line of questioning.

JUDGE HINGES: Well, it is argument in any event. I will allow it.

MR. MATHIAS: Rather than cause the reporter to go all the way back through the record, I will try to recall the question as closely as I can.

By Mr. Mathias:

Q In 1969 and during your later period as purchasing director for the Chicago division, had there been any significant changes in the market share positions of these chains that you have named from that which they had held in 1964, the period 1960 to 1964 which you previously described?

A As I recall it, there was. Jewel Tea experienced a further substantial increase in their share of the market. National Tea, a very slight change. I can't recall whether it was up or down but approximately the same.

A&P dropped substantially and Kroger remained about the same.

Q Was Kroger still below A&P in sales volume, in market share, in your opinion?

A I can't recall that at that time specifically but I believe so.

Q Now, Mr. Bartels, during the period 1960 to 1964 as the unit buyer for the Chicago unit, I think you stated that from

THE WITNESS: I can't recall.

By Mr. McInerney:

Q You tell us in your own words on what you base your answers with respect to the share of the market of any competitor of A&P.

A As I recall at this time a survey was prepared by the, I believe, Chicago Food Brokers Association -- I am not positive of that identification -- based on a sampling of a percentage of the people in the market and arrived at what was supposed to be the amount or the percentage share of the business that they did in the Chicago market.

Q And this survey, whoever prepared it, was this a published document?

A Yes. I would say it was widely circulated. It was a bulletin type form.

Q Do you know of your own personal knowledge how the survey was prepared?

A I have no knowledge of that.

Q Or who would have made the sampling or how the sampling would have been selected?

A I don't know, Mr. McInerney.

Q Do you have any way of ascertaining or did you have any way of ascertaining the accuracy of the survey?

A No, I had no way of doing that.

Q Now, Mr. Mathias also asked you this morning whether you made a check to determine whether Borden was giving the same prices to A&P's competitors that it was giving to A&P. Do you recall that?

A I recall that.

Q Now how could you possibly have made any such check?

A I couldn't. I believe I answered that I didn't make a check and of course I couldn't. I had no way of doing it without having access to Borden's records or the records of my competitors.

Q Now, sir, Mr. Mathias showed you a letter which has been marked Commission Exhibit 263-A. I would like to hand you that and ask you to tell us what that is, please?

A That is the letter that I wrote to Mr. Herschel Smith, to which I attached the quotations from the Borden Company and the ~~Borden~~ Bowman Company on private label milk.

Q Now, sir, prior to your sending that to Mr. Smith had there been a previous quotation from Borden to A&P in the Chicago area on private label milk?

A Yes, sir, there were as I recall, three sections to that before it was completed spanning a period of perhaps five months.

Q What was the earliest section as best you can recall it?

A Probably in February or March of 1965.

Q Can you recall the last section, approximately when that was?

A In late July most likely or possibly very early in August of 1965.

Q When you say three sections, do you mean three sections comprising an entire quotation for the entire area?

A Yes, sir.

Q Now at the time that you submitted this to Mr. Smith, to Herschel Smith, Borden had given you a revised quotation, is that correct?

A That is correct.

Q Is it customary at A&P to permit a vendor or supplier to submit a second quotation with respect to a particular commodity or line of products?

A Mr. McInerney, to answer the question, it is not customary to do that. In this particular instance, as I believe I stated an answer to a question yesterday, in the beginning we had not decided or the Chicago unit had not decided that they were definitely interested in private label milk.

Our first request to Borden was of an exploratory nature and at that particular time we did not feel, because of our uncertainty as to the ultimate decision that we wanted to, you might say, tip our hand to our competitors as to what we were thinking about.

It was also our intention to, when we once made the decision that we were interested in private label milk, to follow our usual custom of securing of multiple quotations or quotations from anybody that was interested in having the business.

Q My question, sir [illegible] -- I believe you have answered my question but let me put another one. You have said that it was not customary in such a situation to permit a supplier to give you a second quotation.

My question now is, why was Borden permitted to do so in this instance?

A Basically because their quotations had spanned a considerable period of time and we felt that it would be fair to tell them or give them the opportunity of either standing on their quotation or submitting a revised one updated to the same time that the other companies were submitting them to us.

Q Turning your attention to Commission Exhibit 263 which you have in front of you, did you at the time that you submitted that to Mr. Smith, make a detailed analysis of the two quotations, that is the Bowman and the Borden quotations that accompanied your letter to Mr. Smith?

A I did not. I used the analysis prepared by the Chicago unit.

Q Turning your attention to 263H, would you tell us please what that is?

A What is the letter we received from Borden pertaining to their quotations on private label milk dated September 21.

Q Was it customary at A&P to receive such a letter from a prospective supplier when they were giving you a quotation?

A Yes, sir.

Q Did you at this time or at any other time prior to October 1, 1965, which is the date of this letter, have any discussion with anyone from the Borden Company with respect to obtaining assurances such as are contained in their letter which has been marked 236-H?

A Yes, that was in February, I believe, or thereabouts, of 1965, and I believe subsequent to the time that Mr. Schmidt had asked the Borden Company for quotations on private label, if they were interested.

Q Will you describe please what was said and who was present on that occasion?

A Mr. Fagerson from the Borden Company, Mr. Minkler from the Borden Company that I can remember. I can't distinctly remember or identify any other Borden people who may have been there but there may have been one more.

Q Will you describe the conversation as best as you can recall it?

A The conversation I believe, as I recall it, started out with a bit of a sales pitch against the idea of private label in a mild way.

When I indicated that we wanted to proceed with this exploratory thing, I asked them whether that would present any problem to them as far as availability for their other customers of private label. As I recall it, Mr. Fagerson said that wouldn't present any problem at all to them.

Q Were you ever told by Mr. Schmidt or anyone else that this Borden quotation that you forwarded on to Mr. Smith was given to ~~metropolitan~~ meet competition? At the time that you forwarded it to Mr. Herschel Smith did you believe that this quotation was cost justified?

A Yes, I did.

Q What was the basis for that belief?

A The basis was that the Bowman quotation, which indicated they had included six percent, as I recall it, or a certain percentage for profit, was comparatively close to it.

As I recall it, the formula that was brought up before, the ~~222~~ 2-2-2, was exceeded in the Borden quotation. I also had a great deal of confidence in the Borden Company in their knowledge of the dairy business, being one of the oldest, I believe, and the fact that it was a large company and had what I thought were very sophisticated cost accounting and legal departments.

Q Did you have any discussion with anyone from Borden prior to the submission of this quotation with respect to Borden's Woodstock plant?

A Oh yes, while that plant was under construction, beginning with the time that it was under construction they kept

assuring us or they told us -- let us put it this way -- that it was designed to be the most modern dairy plant in the world and when it was in operation it should produce substantial economies and that it was their intention to pass along to their customers a portion of those economies.

MR. SHAEFER: Your Honor, I have to object to the witness' speaking and attributing general statements to Borden without some specific frame of reference either to the time period, the persons involved or something of that sort. ~~Not~~ Now the statements insofar as they apply to Borden are completely hearsay.

MR. MCINERNEY: I don't think they are hearsay, Your Honor. I will ask the witness if he can tell us who discussed the Woodstock plant with him, who from Borden.

THE WITNESS: Over the period of time there would have been Mr. Tarr, Mr. Minkler, I believe Mr. Gose and I believe Mr. Walter Heddon.

By Mr. McInerney:

Q Who is Mr. Heddon, sir?

A Mr. Heddon was the Borden employee who apparently devoted most of his time to labor work.

Q Was the efficiency of the Woodstock plant mentioned to you by Borden executives on more than one occasion?

A Oh yes. I can't recall how many but several occasions.

1 fls lyj

Q I think you made what might seem to be a rather cryptic reference to a two-two-two formula which you did mention yesterday, but for the sake of clarity in the record, will you tell us what you mean by the two-two-two formula?

A Well, as I believe I explained it yesterday, that was information that Mr. Herschel Smith gave me that a yardstick or benchmark on private label would be two cents over the cost of raw milk for processing, two cents for delivery, and two cents for the carton and in the processing, of course, I should have said processing and profit, that would fall in there, and those figures would be per quart.

Q Now, would the figures for the half gallon be the same?

A Approximately. I can't recall. There may have been a very small fractional difference in them.

Q In which direction?

A Probably slightly less at this particular time.

Q So that the benchmark that you would use for the half gallon would not be precisely 12 cents added to the cost of raw milk but would be something less than that, is that correct?

A That is correct, but the difference would be very slight.

Q Now, sir, at the time that you sent your letter of October 1, 1965 to Mr. Smith, that is Commission Exhibit 263(a) with the attachments, did you believe that the Borden offer was preferable to the Bowman offer?

A Yes, I did.

Q I notice that there is not with the Bowman offer a letter comparable to the one marked 263(h) from the Borden Company. That is their letter of October 1, 1965 to Mr. Elmer Schmidt. Can you explain the absence of such a letter from the Bowman Company?

A It was not our practice, when asking important quotations, to include the request for the availability letter as part of our request to the various companies, and only after we had decided which company seemed to be the one we wanted to supply to us the merchandise, then we would go to them and ask for the availability letter.

Q Have you recently, at my request, made a more detailed comparison of the Bowman and the Borden offers that are contained in Exhibit 263?

A I have.

Q And what is the result of your analysis?

A The analysis shows that Bowman was quoting on a 3.5 butter fat basis compared to a 3.4 for Borden. The Bowman quotation started with a $4.32 a hundredweight, I believe, price on raw milk and the Borden quotation started with a $4.29 price on raw milk.

The Bowman quotation covered both private label or the Bowman brand. We could take our choice. The Borden quotation covered only private label and that became significant in the price of gallon glass bottles of milk, which we did not want to handle under private lable but under the dairy's label.

As I recall the analysis I made at your request, there was a difference in the price between what we were paying Borden for gallon glass milk and Bowman's proposal of slightly over ten cents per gallon lower for the Bowman label.

As I recall the figures, we used something over a million gallons a year, which would result in a saving of roughly $100,000 by changing to the Bowman brand and in the case of the difference in butter fat and the price of fluid, three cents difference in the price of fluid milk, that would bring the cost of the major items on the Bowman brand -- that is, the quarts and half gallons of milk -- below the Borden quotation for private label.

Q Was that also true on the quotation for gallons as well in private label? I think you mentioned quarts and half gallons.

A Yes, it would be true for gallons.

Q So thatthe net price per unit from Bowman would be less than the quotation of Borden when both were put on a comparable basis, is that correct?

A That is correct.

Q Now, you mentioned that the Bowman quotation was for either private label or brand label. Did the private label program involve additional expense to A&P as compared to selling brand label?

A Yes, it did. It involved additional expense where the method of delivery was changed to a store dock delivery instead of its being placed in the coolers or cases. It meant the elimination of servicemen as contrasted to deliverymen who would visit the stores and service the cases and do the rotating, a large share of the rotating, date freshness control rotating.

It, of course, meant that we would have to spend our money to promote the private label instead of relying on the dairies' promotional efforts.

Q Let me interrupt you there, if I may. With respect to the previous items you mentioned, apart from the promotional expense, wasn't the Bowman offer on the basis of eliminating many of those services as well as the Borden offer? Weren't they comparable in that respect?

A Oh, yes, both were comparable in that respect.

Q With respect to the promotional expense, would there have been an additional saving to A&P to take a brand label at prices such as those quoted by Bowman rather than going into the private label program? Do you understand my question?

A Yes, I believe I do. I believe there would be, to the extent of what the advertising expense would be.

Q The Chicago consumer did not know of an A&P brand milk at this time in October 1965, is that correct?

A That is correct. Of course, that was one of the concerns we have had early in not making a decision without exploratory work that was involved in the private label.

Q Was the Bowman label well known in the Chicago market?

A Yes, sir.

Q Now, as a result of all these considerations that you have testified to, comparing the Bowman bid with the Borden bid, what is your present opinion with respect to the relative value of these quotations to A&P? Which was the better quotation?

A Well, the Bowman quotation was better.

Q Would you look again at Borden's letter, which has been marked Exhibit 263(h), and tell us what you understood tha letter to mean when you received it?

MR. MATHIAS: Your Honor, I would object to this witness testifying as to what he understood it to mean unless some basis is laid for showing that there was a basis for that understanding.

JUDGE HINKES: I don't know that this witness is qualified to state the meaning of words used by someone else as to his impressions, I don't know whether thatis at all pertinent.

MR. McINERNEY: I think it is on the issue of good faith, Your Honor. I think he did read it at or about the date it bears, and I am asking him what his understanding was at that time. I don't know what basis further than that I can lay for it. I think there is no need for a further basis.

JUDGE HINKES: I will allow the witness to answer on the issue of good faith, as you put it.

THE WITNESS: Would you please repeat the question?

By Mr. McInerney:

Q Looking at 263(h), that letter of October 1, 1965 from the Borden Company to A&P, when you read that on or about October 1, 1965, what was your understanding of the meaning of that letter?

A I understood it to mean that their prices were legal and proper in every respect and that they were prepared to prove that such was the case.

Q What was your understanding with respect to their making the prices available to others?

MR. SCHAEFER: Objection to that question, Your Honor No foundation laid for the whole area of making the prices available to others.

MR. McINERNEY: I think there has been a foundation, there was testimony with respect to a conversation he had with Borden.

MR. MATHIAS: Back in 1965, before, he states, they were very seriously engaged in negotiations with Borden.

MR. McINERNEY: I don't think this is the proper time for that kind of argument.

Now, the question is, what was your understanding of that language at that time?

THE WITNESS: May I have my previous answer read or do you want me to start from the beginning?

JUDGE HINKES: If you wish, you may start from the beginning, whatever way you prefer.

MR. McINERNEY: If you would like your answer read, His Honor will allow it to be read.

JUDGE HINKES: Will the reporter find it once again?

(The record was read by the reporter.)

By Mr. McInerney:

Q I think the question is, what do you now recall about what you understood the language to mean?

A In my previous statement, I said in every respect, which included in my mind that it was available, or would be available, of course, on a proportionately equal basis to all their customers, that it would not be below cost or that it could be cost justified, and that they were in a position to prove that it met every legal requirement.

Q Now, sir, had you had any discussion with Mr. Elmer Schmidt on the subject of the availability of Borden's prices to other Borden customers prior to your receipt of that letter?

A Yes, sir.

Q Would you tell us the substance of that discussion?

A The substance was this: It started with the fact that length of time that I was in Chicago and in the Division and back into Chicago.

MR. McINERNEY: Your Honor, at this point, I would like to show those exhibits to the witness unless Your Honor has some further question he would like to explore at this stage.

MR. SCHAEFER: Your Honor, may I interject that there has been no foundation laid as of yet for showing the witness the documents. The witness' independent recollection of any of the events or matters covered in those documents has not yet been probed and in such a posture, it is inappropriate to show documents to him.

MR. McINERNEY: I don't think we have to exhaust the witness' recollection but that is the purpose of my making the statement.

JUDGE HINKES: These letters, I presume, are being offered to be shown to the witness for identification purposes. Is that right?

MR. McINERNEY: Yes, sir.

JUDGE HINKES: I am going to allow that. Whether or not this witness is the one who can authenticate the documents, I don't know but at least the attempt cannot be denied.

MR. McINERNEY: Thank you, sir.

By Mr. McInerney:

Q I show you what has been marked A & P Exhibits 16, 17 and

18 and I would like you to look at those letters and tell us what they are or what you know about them.

JUDGE HINKES: Can you identify those letters, Mr. Bartels?

THE WITNESS: I can identify this first one. I have not read the others.

JUDGE HINKES: The first one, August 3, what do you know of it?

THE WITNESS: That was sent to me in connection with a proposal to service stores as identified in the letter and I in turn forwarded it to Mr. Herschel Smith in New York.

JUDGE HINKES: It is addressed, however, to Mr. Nelson and not to you. Can you explain that?

THE WITNESS: Mr. Nelson was the Unit Buyer in St. Louis, and, of course, would have forwarded this to me along with the schedule of proposed prices.

JUDGE HINKES: Did he forward this letter to you?

THE WITNESS: I recall that he did.

By Mr. McInerney:

Q May I ask what your position was as of the date of that letter?

A In 1967, I was Purchasing Director of the Middle Western Division.

Q Did that include Mr. Nelson's Unit increase?

MR. SCHAEFER: I think the question is whether the witness recalls this specific document.

JUDGE HINKES: I believe he answered that he did recall.

By Mr. McInerney:

Q Will you look at the next letter, please sir?

A Yes. The two came in together, as I recall it. They referred to the same proposal. Both the August 3 letter and August 8 letter were submitted by Mr. Nelson to me with the proposal at that time.

MR. McINERNEY: I offer those in evidence, Your Honor

MR. SCHAEFER: I object to that, Your Honor, on several bases and request voir dire of the witness with respect to these items.

JUDGE HINKES: Perhaps before we get into that, we ought to recess because I can see where this might involve some extensive discussion. If I am wrong, of course, tell me and I will allow you to be on now, Mr. Schaefer.

MR. SCHAEFER: I think that is right, Your Honor, that would be best.

JUDGE HINKES: We will, therefore, recess at this time and resume in this room at 1:30 p.m.

(Whereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. the same day.)

AFTERNOON SESSION

1:30 p.m.

- -

IRA R. BARTELS resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

JUDGE HINKES: The hearing will be in order.

You were going to conduct some voir dire at this point, Mr. Schaefer?

MR. SCHAEFER: Yes, sir, thank you.

VOIR DIRE

By Mr. Schaefer:

Q Mr. Bartels, calling your attention once again to the two documents that have been marked Respondent A & P's Exhibits 16 and 17, these are letters dated August 3 and August 8, 1967. Just to make sure the record is clear, Mr. Bartels, do you now recall having seen these letters on or about the date that they bear in the year 1967?

A It would be shortly after the eighthof August, 1967.

Q My question is just whether you are recalling that you would have gotten them or whether you specifically recall seeing them at some point in late 1967?

A I recall seeing them.

Q Mr. Bartels, were you personally involved in the negotiations to which these two letters relate?

A I was not.

Q Did you have any contact with any Borden personnel with respect to the proposals to which these two letters relate?

A No.

Q Were these letters forwarded to you with some covering letter or memorandum?

A They were forwarded to me with a covering letter and the attachments which were the proposal.

Q Do you know, Mr. Bartels, why the letter dated August 8, the one which is marked Respondent A & P Exhibit 17, do you know why that letter was written?

A I have no idea.

MR. SCHAEFER: I have no further questions on voir dire, Your Honor.

JUDGE HINKES: The documents have been offered in evidence. I will hear objections if there are any.

MR. SCHAEFER: I would like to ask first, Your Honor, whether these documents are being offered with respect to Count 3 of the Complaint.

MR. McINERNEY: Your Honor, I am offering them as part of A & P's defense. I am not directing them against Borden or with respect to any allegation against them. I find it difficult to respond to Mr. Schaefer.

MR. SCHAEFER: The problem, Your Honor, is, as you might anticipate from my comments this morning, one of our objections to the admission of these documents relates to whether any showing of relevance to this proceeding has been made.

The questions of relevance as to Counts 1 and 2 are very different in many respects from the question of relevance to Count 3.

MR. McINERNEY: I agree with Mr. Schaefer. I think they have more relevance to Counts 1 and 2.

JUDGE HINKES: If you have objection with reference to relevance to Count 3, you may persuade me ---

MR. SCHAEFER: I was wondering whether A & P was offering them ---

JUDGE HINKES: I think Counsel for A & P is offering them in defense of its own position and not necessarily as attack on its co-Respondent. However, Complaint Counsel will be entitled to use this document for that purpose unless it is restricted.

MR. McINERNEY: If there is any way of shortening this by my saying I am offering it with respect to Counts 1 and 2, I will do that because I do think they are much more germane to those Counts.

JUDGE HINKES: You may make that limited offer and it will be received for that purpose only. Then it will be up to Complaint Counsel to use them for other purposes if he wishes to but that will have to be on a separate offer.

MR. SCHAEFER: In that regard then, Your Honor, since Borden is not a party to either Counts 1 and 2, I don't think it is necessary for us to further pursue our objection to the admission of these documents.

JUDGE HINKES: Very well. Mr. Mathias, any objection?

MR. MATHIAS: No objection, Your Honor.

JUDGE HINKES: Respondent A & P Exhibits 16, 17 are received and are limited to Counts 1 and 2 of the Complaint.

XXX (The documents referred to were received in evidence limited to Counts 1 and 2 of the Complaint.)

By Mr. McInerney:

Q Mr. Bartels, I believe you have in front of you another document which has been marked C-A & P X-18. Do you have that in front of you, sir?

A Yes, sir.

Q Would you examine that, please, and then tell us what it is?

MR. MATHIAS: Your Honor, not to interrupt, but for clarification of the record, but the exhibit Mr. McInerney mentioned has been marked R-A & P X 18- A & B.

HINKES: Yes.

MR. McINERNEY: Thank you.

JUDGE HINKES: You may continue, Mr. McInerney.

By Mr. McInerney:

Q Mr. Bartels, did you receive this document sometime in or around September 1967?

A Yes. It was subsequent to September 2, 1967.

Q With respect to this document as well as the two previous documents that you have looked at which have been marked Exhibits 16 and 17 for A & P, how did it come about that you received these documents?

A Document 18-A was Borden's proposal to service stores in the Metropolitan St. Louis area with private label milk. The proposal with this letter was forwarded to me with the other proposals that our St. Louis office had received from other dairies.

Q You mentioned 18-A. Does your answer equally apply to 18-B?

A 18-A and B.

Q Sir, how did it come about that Mr. Nelson in St. Louis sent this letter to you? Was that part of his responsibility or duties in his capacity as the Unit Buyer in St. Louis?

A Yes, it was.

Q Was it the customary practice for a Unit Buyer such as Mr. Nelson to send proposals such as that contained in R-A & P Exhibits 16, 17 and 18 to you as Division Director of purchases for the Middle Western Division?

A Yes, he was required to do that for all proposals on the particular area. In other words, they would come in together with his summary of them and his recommendations as to which one he felt was most favorable.

MR. McINERNEY: I offer A & P Exhibits 18- A & B in evidence.

MR. SCHAEFER: Objection, Your Honor and I request a brief voir dire.

JUDGE HINKES: You may.

MR. McINERNEY: Will you withdraw your objection if I make the same limitation with respect to the same document?

MR. SCHAEFER: Yes.

MR. McINERNEY: This is being offered under Counts 1 and 2.

JUDGE HINKES: Do you still wish voir dire, then, Mr. Schaefer?

MR. SCHAEFER: If it is only being offered with respect to Counts 1 and 2, I don't believe that will be necessary, Your Honor.

MR. MATHIAS: Your Honor, I will have one or two brief questions on voir dire.

JUDGE HINKES: Very well.

XXXXX

VOIR DIRE

By Mr. Mathias:

Q Referring to Respondent A & P Exhibit for identification, 18-A and B, what relationship, if any, does it bear to the previous two exhibits Respondent A & P Exhibits 16 and 17?

A The only relationship would be that both of them involve proposals to produce and deliver private label milk but the areas, as you will notice, are entirely different.

Q Did you have any contact with the Borden personnel in connection with this particular transaction?

A No, sir.

Q Do you have any personal knowledge as to the stores that are covered by the proposal in R - A & P X-18 A & B for identification?

A Yes, they would be the stores in the Metropolitan St. Louis area.

Q Were you involved in any way in negotiations for this arrangement?

A No, sir.

MR. MATHIAS: No further voir dire, Your Honor. No objection.

JUDGE HINKES: I gather, Mr. Schaefer, you have withdrawn your objection.

MR. SCHAEFER: That is correct, Your Honor.

JUDGE HINKES: 18-A & B is received and relevant only to Counts 1 and 2.

(Respondent A & P Exhibit 18-A & B was received in evidence as limited to Counts 1 and 2.)

By Mr. McInerney:

Q Looking at R - A & P Exhibits 16 and 17, Mr. Bartels, I believe in response to a question from Mr. Mathias you said that these referred to a quotation by Borden on private label milk. Do you recall that?

A Yes, sir.

MR. MATHIAS: Your Honor, I posed no such questions to the witness. I had no voir dire on Respondent's Exhibits 16 and 17.

MR. McINERNEY: But in response to a question that you asked, asking him what the relationship was between 16, 17 and 18, I believe the record will show he so stated and he has reaffirmed he so stated so I don't think we need to be detained on that subject.

JUDGE HINKES: Very well.

By Mr. McInerney:

Q Sir, with respect to this private label proposal referred to that was the subject of the letters marked R - A & P - X - 16 and 17, what did you do with those letters?

A These letters,together with the price schedule as part of the proposal, were forwarded to Mr. Herschel Smith in New York.

Q Sir, can you tell us if you recall, did Borden get the business? Was that quote accepted?

A Yes, the one on 16 and 17 was accepted.

Q What about the proposal to which R - A & P Exhibit 18-A and 18-B refers, was that accepted?

A We did not accept Borden's proposal referred to in 18-A and B.

Q Was R - A & P Exhibit 18-A and B forwarded to New York, sir?

A Yes. They would have been forwarded together with the schedule of prices and so forth that Borden had submitted along with those received from other companies quoting on the same business in St. Louis.

Q Sir, I believe you have told us that prior to the final Borden quotation which you sent to New York, along with your covering letter which has been marked Commission Exhibit 253-A, there was a previous Borden quotation that came to you in several segments. Do you recall that?

A Yes, sir.

Q Do you recall what the approximate projected savings to A & P on that previous Borden quotation were, if my question is clear? If it is not clear, I will try to rephrase it.

A By previous Borden quotation, you are referring to the one that I said consisted of three parts?

Q Yes, sir.

A As I remember it, it was in the neighborhood of $400,000 a year were we to go 100 percent to private label.

Q Sir, did you discuss that prior quotation, if you understand my question, with Elmer Schmidt?

A The prior quotation, you are referring to the $400,000?

Q Yes.

A Yes, I did.

Q What did you conclude with respect to this $400,000 quotation?

A My discussion with Elmer Schmidt was to the effect that I didn't feel that it would be economically sound for us to go to private label on the basis of those figures.

Q Why was that?

A I made a rough calculation that that amounted to, I think, somewhere between four or five dollars per store per day on a six-day-a-week basis and that for us to absorb the labor of moving the milk from the delivery point into the cooler, from the cooler to the case, rotating the milk in the case, absorbing the loss on outdated milk and whatever might be involved in the advertising and promotion of our own label, it didn't appear to me it would be worth our while to make the change.

Q Sir, did anyone from Borden discuss with anyone from A & P in your presence what A & P's out-of-store price on private label milk and dairy products would be?

A No, sir.

Q Where is A & P's Legal Department, Mr. Bartels?

A The only one I know of is in New York City.

Q Did you have one in the Chicago Division or the Chicago Unit?

***

(The pages referred to were marked Respondent Borden Exhibit RBX-6A and RBX-6B for identification, and was received in evidence.)

MR. McINERNEY: If you are not going to go any further --

MR. SCHAEFER: No, I am not.

MR. McINERNEY: Then I will not restate my objection.

By Mr. Schaefer:

Q Mr. Bartels, you testified this morning that the final Borden proposal and the Bowman proposal were transmitted to Herschel Smith in New York. My question is how the transmission was made, was the proposal taken to him personally by you or anybody else, or was it mailed to him?

A It was mailed to him.

Q Mr. Bartels, you testified this morning that both before and after October 1, 1965 you had received letters from Borden containing language like or language of the sort contained in Commission Exhibit 263H, which is the letter from Mr. Tarr that I believe you have in the exhibits before you. Can you tell us, Mr. Bartels, on what specific occasions prior to October 1, 1965 you had received such letters from Borden.

A No, I can not tell you specific occasions.

Q Can you tell us of any occasion?

A Not specific. By specific do you mean dates?

Q Well, let me ask the question in a different way. Can

I think the witness' testimony, however, is quite clear on the subject.

JUDGE HINKES: I think we should make it a little easier for the witness to know exactly what youare speaking of.

Let me get the chronology correct. At one particular time, Mr. Bartels, Mr. Schmidt submitted a Borden bid to you and you noted that it did not contain a letter from Borden concerning the legality of the price and you asked Mr. Schmidt to get a letter.

THE WITNESS: That is correct.

JUDGE HINKES: What did you ask him to get, specifically?

THE WITNESS: I asked him specifically to get a letter indicating that the prices were available to others on a proportionately equal basis, that the prices quoted were not below cost and that they were legal in all other respects.

JUDGE HINKES: And the transmittal of October 1, I think it is --

THE WITNESS: Yes, sir.

JUDGE HINKES: --was in response to your request to Mr. Schmidt, is that correct, 263-E?

THE WITNESS: That was Borden's response to Mr. Mr. Schmidt's request.

JUDGE HINKES: And also in response to your request to Mr. Schmidt?

THE WITNESS: To Mr. Schmidt.

MR. SCHAEFER: My question, Your Honor, is to clarify and make certain that there were not any other discussions with Mr. Schmidt about this letter. That was the ambiguity.

JUDGE HINKES: Was that the only discussion you had then with Mr. Schmit, that discussion in which you told Mr. Schmidt to go back and get a letter of availability or some such letter from Borden?

THE WITNESS: Prior to receiving the letter or subsequent to?

By Mr. Schaefer:

Q Prior to receiving the letter.

A This was the only discussion.

MR. SCHAEFER: No further questions.

JUDGE HINKES: Is there anything else, gentleman?

MR. McINERNEY: No, sir.

MR. MATHIAS: No further questions.

JUDGE HINKES: There is only one thing that disturbs me, and I dont know how pertinent this inquiry is in any event, but I am a little surprised by the Bowman bid which was identical for both private label and for Bowman label in view of your testimony that the private label meant additional cost to A&P and lower cost to the supplier. Can you explain the identical pricing under those circumstances?

THE WITNESS: I can't explain why Bowman priced them

(The papers referred to were marked Commission's Exhibits 200-A through -Z-4 for identification.)

MR. MATHIAS : Mark for identification CX-202-A through Z-13, consisting of tables summarizing and detailing price comparisons between Borden's price to Wilco Food Center, Gary, Indiana, and to A & P stores in Gary for each month of the periods October 1966 through March 1967 and June 1969 through March 1970; together with tables showing percentage relationship between (1) items purchased in common by Wilco Food Center and A & P stores in Gary, Indiana, and (2) all items purchased by Wilco Food Center from Borden.

(The papers referred to were marked Commission's Exhibits 202-A through -Z-13 for identification.)

By Mr. Mathias:

Q Mr. Bitting, I have handed you copies marked for identification as CX-188, 190, 191, 193 through 198, 200, and 202, with various subparts. Are you familiar with these documents, sir?

A Yes, I am.

Q Who prepared these documents?

A I prepared these various documents.

Q Can you describe in a general manner what these exhibits purport to show?

A They purport to show for the time periods indicated price comparisons of common items purchased by each of the eleven customers,as well as the unit price, both on the unit price basis and on an overall item base.

Q What do you mean by an overall item base? The combined total of all of the units?

A The detailed unit price information as given on a weekly base, and then the weekly information has been summarized on a monthly basis, either a four- or a five-week period making up the monthly picture.

Q How were the customers selected for the preparation of these various tabulations?

A Commission's Counsel supporting the Complaint made the selection of the eleven customers.

Q Upon what underlying documentation are these various exhibits based?

A These exhibits are based mainly on invoices from the Borden Company to the A & P store or A & P stores in the three cities mentioned in the description of the documents, as well as the Borden invoices to each of the eleven stores.

Q And are those underlying documents present in this hearing room?

A Yes, sir, they are.

Q And where would we find them?

A Those underlying documents are on the table to my left, right here in the corner of the table.

Q The rear corner of the room to the left of the witness.

A To the left of my table.

Q You mentioned the term "common items" a few moments ago. What did you mean by the term "common items," Mr. Bitting?

A A common item is an item which was bought by each of the eleven customers selected on a weekly basis as well as being purchased by the A & P store in the particular town the customer is located.

Q Referring to CX-188 and turning to 188-C, could you explain for us just what you have done on CX-188-C?

JUDGE HINKES: Let's go off the record.

(Discussion off the record.)

[***

the same procedures were followed as you have described in connection with the first week, the week ended October 8, 1966, is that correct, sir?

A That is correct, with slight modification.

Q What modifications would be made?

A There were certain periods during the 16-month period, specifically the period of January through March, 1967, and January through March of 1970, where the Borden Counsel was not able to provide us detailed rebate information. They did supply some rebate information which was used in the determination of the rebate, but it wasn't as detailed as for the three months of October through December, 1966 and the period of June through December, 1969.

Q When you talk about rebate information, are you talking about the actual rebates themselves, or the work papers showing how they were prepared?

A The work papers, the detailed work papers were not provided for these two 3-month periods.

Q But you did have the Borden record showing the amount of the rebates paid to these customers?

A We had the Borden records showing the amount of the rebate which we used to verify, as well as for the second three-months period, the period of January through March, 1970. We had a paper called "the sales expense checks" which showed the amount of the rebate, as well as the percent of the rebate now. We have a witness on the stand who is attempting to explain his work and his work product, who is attempting to explain how he computed certain figures.

His explanation may be totally unsatisfactory to you, and then perhaps to me as well, but that is Compalint Counsel's case, good or bad, that is his case, and you can destroy it if you wish to by offering contrary evidence, by cross-examining this witness, or what have you.

Right now, this witness if giving us his answers, and as such, they must be received. If and when you have heard all of his answers, you think the Exhibit should not be received in evidence, I will hear your arguments on that score for whatever reasons you may be able to advance as a result of your cross-examination of this witness.

MR. McINERNEY: I presume there will be an opportunity when the offer is made for a possibility of a voir dire?

JUDGE HINKES: Of course, of course.

MR. McINERNEY: Thank you.

JUDGE HINKES: You may continue.

MR. MATHIAS: Your Honor, of course I would like it noted on the record that Complaint Counsel do not agree with any of the gratuitous statements of A & P's Counsel.

JUDGE HINKES: I didn't expect it.

By Mr. Mathias.

Q Mr. Bitting, now in each instance, in the case of Burger's and the other customers on the subject of these price comparison tabulations, did you have the invoices for each of these months to the various customers?

A Yes, sir, I had the Borden invoices to the customers.

Q And these invoices were the source of the purchase volumes which you have used in your summary exhibits?

A Yes, sir.

Q In each instance, did you have a copy of the record of the rebate payment ot each of these customers for each month?

A Yes, sir, in some for.

MR. FOLEY: Your Honor, I move to strike that answer. There is no way the witness could possibly know that he had all the rebate payments. How could he know, or at least there is no foundation for it.

JUDGE HINKES: I will sustain that objection. The witness' answer will be stricken.

By Mr. Mathias:

Q Mr. Bitting, in the case of Burger's Market, for each month of the two time periods covered by CX-188, with subparts, did you have a copy of a check register of the Borden Company showing a rebate to that customer for each of those months?

A Yes, sir, I did.

Q In addition, for certain periods of the time involved, that is the first three months, October through December, 1966, and for the period June 1, 1969 through March of 1970, you had additional records concerning rebates to this customer, is that correct, sir?

A Yes, sir.

Q And what was the nature of this additional material?

A This was in the form of correspondence from Borden's Counsel, letters dated February 24, 1971, I believe -- may I check my records?

JUDGE HINKES: Yes.

THE WITNESS: There were two letters from the Borden's Counsel, Mr. Schaefer. One was dated February 3, and another one was dated February 24, and then there is also a letter from Mr. Schaefer, Borden's Counsel, dated April 7, 1971.

MR. FOLEY: We don't have that, Mr. Mathias.

JUDGE HINKES: Off the record.

(Discussion off the record.)

JUDGE HINKES: On the record.

MR. SOEFFING: Let the record show that I turned three letters over to A & P Counsel. One is February 3, 1971; one is February 24, 1971; one is April 7, 1971, all from the law firm of Sidley and Austin, Chicago, Illinois.

mcg-
19

fols mt

MR. FOLEY: Mr. Soeffing, is there an enclosure or attachment to the April 7th letter?

MR. MATHIAS: Your Honor, insofar as enclosures are concerned where additional documentation was forwarded, I would explain that this was a follow-up on the subpoena return by Respondent Borden, and they were submitting some additional materials, and in one or more letters they did include additional detail documents and those are among the original documents that we have on the table, and they are available for inspection on the table.

I do not have extra copies here in my own file as to these.

MR. FOLEY: When we finish this afternoon, could I ask that I be shown specifically which ones they are? There are thousands of documents on that table.

JUDGE HINKES: Could you help Mr. Foley find it?

MR. MATHIAS: Yes, Your Honor, we would be very happy to do it. We have offered to do it in the past.

MR. FOLEY: I would state in reference to that, when I spoke to Mr. Bitting and Mr. Mathias, I was advised of the February 3 and February 24 communication by Borden Counsel to the Federal Trade Commission. I was never advised of the communication on April 7, 1971, nor was I advised by Borden Counsel on that letter.

We did not receive a copy of that letter. This is the first time we heard of it.

MR. SOEFFING: I merely wish to state that Mr. Foley never asked for that letter.

MR. FOLEY: That is ridiculous. How could I? I didn't even know it existed.

JUDGE HINKES: I think we understand the situation.

MR. MATHIAS: Your Honor, the simple fact is that we have had all of this material and our accountant available all of this time and we had never intended to send them every piece of documentation upon which these tabulations were based, and we so informed them over a year ago. It is rather obvious we just couldn't supply them with every one, and to supply one little paper here and there would serve no purpose.

JUDGE HINKES: In any event, Respondents have full access to any of the underlying material by which this witness is testifying and it is here, presumably available for their inspection.

I think that upon request Complaint Counsel will offer you any assistance you need for your purposes.

MR. FOLEY: Thank you.

MR. MATHIAS: Yes, Your Honor. I hereby again state that Mr. Bitting will be available to explain where each and every one of these figures came from and which documents they should refer to in order to find a particular document.

JUDGE HINKES: Very well.

eacg 21

By Mr. Mathias:

Q So that, Mr. Bitting, when you are talking of the information received in letters from Borden Counsel and these Borden worksheets, you are talking of information in addition to the basic record of the sales to Burger's, that being the invoices for each month and the record of payment of a rebate to Burger's for each month; is that correct, sir?

A Yes, sir.

Q And these would then be materials which you used in checking out the manner in which you applied the rebate check to the monthly purchases to obtain a net price?

A That is correct.

MR. MATHIAS: Your Honor, we are faced with sort of a problem here of whether to go forward and use up valuable time which we are going to need to prepare for Mr. Minkler, but there are still a couple of pages of documents to go through, and obviously there is going to be some voir dire from Respondents.

It would seem, though, probably the wisest course at this stage would be to adjourn until tomorrow and take Mr. Minkler's testimony, and then come back to Mr. Bitting. I just don't believe that we can accomplish that much more this afternoon even by the four o'clock time period.

JUDGE HINKES: Very well. I think that is perhaps the best course to follow at this time. By pre-arrangement, which he is attempting to verify.

MR. McINERNEY: Thank you, sir.

JUDGE HINKES: Very well, Mr. Foley.

VOIR DIRE

By Mr. Foley:

Q Mr. Bitting, could you tell us where you got the unit prices for A&P in Hammond? You indicated this morning there were three A & P invoices or Borden invoices to A &P that you itemized; is that correct?

A Yes.

Q Were the prices on all these invoices for all units the same?

A Yes, for the three Hammond stores, they were.

Q And you spoke also about using common items: thatis, an item that was purchases by Burger and that was purchased by one of the A&P stores in Hammond. Is a common item in your definition an item that was purchased by all three of those A&P stores that you looked at? Did it have to be purchased by all three?

A It did not have to be purchased by all three as long as it was purchased by one of the Hammond stores.

Q Mr. Bitting, where did you get the A&P invoices for Hammond? Physically, the Borden invoices to A&P for the Hammond area. Where did you physically obtain them?

A For what period?

private label and Borden label, the price shown here is only one of those two prices.

By Mr. Schaefer:

Q That is correct, isn't it, Mr. Bitting?

A Yes, sir.

MR. SCHAEFER: Whatever may be the applicable law under the Robinson-Patman Act, this is the reason that I ask you, Your Honor, to view this exhibit as it relates to Count 3. And whatever justification Complaint Counsel make for offering it, it becomes apparent that it is a highly structured and, we will argue, not realistic picture.

MR. MATHIAS: Your Honor, if I could, maybe Complaint Counsel could clarify the situation a little.

There has been an obvious misunderstanding of Complaint Counsel's instructions in this instance --

MR. FOLEY: Your Honor, I would object to Complaint Counsel testifying.

JUDGE HINKES: Well, we have heard from Mr. Schaefer an explanation of what he is trying to prove. I think under those circumstances, Complaint Counsel is entitled to reply.

MR. MATHIAS: Your Honor, the document was only to compare private label pricing with the pricing to Burger's.

I was unaware of the inclusion of this onion dip under Borden's label, and I think that if a couple of questions were pointed to Mr. Bitting, we could find that in each and every instance where this error creeps into his calculations, it is with a product such as onion dip, and that these calculations can be quickly altered to exclude that product from the calculations.

The calculations sholld not contain the product where one of the A&P stores did not purchase it under a private label.

JUDGE HINKES: Well, be that as it may, if there is an inconsistency that you can see, naturally you will want to correct that at some stage of this proceeding, but I don't think that that should interfere with Mr. Schaefer's attempt to demonstrate the inconsistency, the alleged inconsistency of this particular document.

MR. MATHIAS: No, Your Honor. I wasn't intending that. I realize that Mr. Schaefer has the right and the opportunity to go into those matters.

JUDGE HINKES: Very well.

You may continue, Mr. Schaefer.

MR. SCHAEFER: Thank you.

By Mr. Schaefer:

Q Now, Mr. Bitting, just so the record will be clear, if I understand it, you took each week as a separate unit for purposes of determining what products will be included on the list. Is that correct?

A That is correct.

indicated yesterday, when an exhibit with the captions are prepared for Robinson-Patman Act purposes, the only way to get the information out so that Your Honor can evaluate what has gone into it for purposes of Court 3 is to ask these kinds of detailed questions.

JUDGE HINKES: What are you trying to determine with this question? Right now, the pending question?

MR. SCHAEFER: Well, I think I understand where I am in the line of questioning. I don't recall the exact question. Perhaps the reporter can read it back to us.

(The pending question was read by the reporter.)

JUDGE HINKES: And once you have the answer to that, then what?

MR. SCHAEFER: Well, I come back again, Your Honor, to the example that we picked this morning, which I have tried to use throughout my questions in order to give us some focus.

And I want to establish, I want to make it clear, that in preparing this exhibit Mr. Bitting did not reflect in these figures the prices of certain identical dairy products, which is in fact what the caption seems to indicate.

JUDGE HINKES: Referring, presumably, to the Borden label as distinguished from the private label, is that it, on the A&P purchases?

MR. SCHAEFER: Well, in the sense that Burger's was the caption of "Total Net Billing to Burger's"? Is that correct?

A Yes, sir.

Q So only the caption is different. The method is the same?

A Yes, sir.

Q And finally, how did you arrive at the percentage figure shown in the far right-hand column of Commission Exhibit 188B?

A That is a calculation based upon the relationship of Column 2 on that 188B divided by Column 1.

Q And the figure shown as a six-month total is computed in the same way?

A Yes, sir. For the last column, that is. The first columns --

Q The far right-hand column is computed by dividing the first column into the second column?

A That is correct.

MR. SCHAEFER: I have no further questions.

MR. MATHIAS: Your Honor, I have a couple of questions that have been raised by the voir dire.

JUDGE HINKES: You may continue.

XXXX DIRECT EXAMINATION (Resumed)

By Mr. Mathias:

Q Mr. Bitting, in the questions by Mr. Foley, there were sheets in connection with the various customers which you have prepared computations.

MR. FOLEY: In which case I would object, Your Honor. Complaint Counsel objected to my proceeding in my voir dire beyond the strictest confines of the exhibit, and Your Honor sustained that objection, and I likewise press the same complaint.

JUDGE HINKES: Limit your question at this point to this particular exhibit, Mr. Mathias.

By Mr. Mathias:

Q In the case of the work sheets insofar as they related to Burger's, did Borden use the total amount during any month as compared to the net amount?

A They did.

Q Now, in your opinion, does it make a substantial difference in your calculations if you use the net amount or the total amount?

A The calculations, it wouldn't make any difference, since the bottle adjustment is so small.

Q Why did you use the total amount?

A The main reason was for the keeping out of the tabulations any connection with the bottle adjustment. The bottle adjustment, I felt, should not enter the picture, because it wasn't a milk product. A discount, reduction in price, that a customer of Borden's received, I felt should be applied rate of 5.9 percent for the months of October and November, 1966, whereas the Borden work sheets for Burger's Market for October and November, 1966, indicates that the discount was six percent? Is that not a fact?

A That is correct.

Q And is it not a fact that the difference of one-tenth of one percent in discount, at least in the months of October and November, 1966, is as a result of a $50 bottle credit which makes a difference between the figure that you used and the figure that Borden used on its work sheets?

A Yes, sir.

Q So in the case of October and November of 1966, whether one includes the bottles does make a difference?

A I was under the impression that Mr. Mathias was referring to a substantial difference.

JUDGE HINKES: Let me ask you, Mr. Bitting, how did you figure this $50 difference? How does one arrive at that?

THE WITNESS: At the bottom of the invoice, Your Honor, of each weekly invoice, there is a line headed "Bottles", and generally they show the number of bottles on the invoice which were delivered, and on the invoice the bottles which were returned, so the item on the line headed "Bottles" under the total amount line reflects the difference between the number of bottles delivered and the number returned, which could result in a credit or a charge, depending upon the deliveries and the returns.

However, there were a number of onvoices where the customer did purchase glass bottles, and there was no adjustment. In fact, in one period for months the customer received glass deliveries of homogenized vitamin D in gallons, in glass containers, and there was no adjustment, no bottle adjustment, which seemed very unlikely, in view of the fact that the number of returns, from my experience in grocery stores, does not always tie in with the number of bottles delivered.

That was one reason why I figured this net amount on the invoice was incorrect.

Little
ds,
EMcG
fols.

***

indicated that instead of a percentage discount received by Model they received a certain cents-off on certain items.

Q What items were involved, sir?

A The item on which they received a certain cents-off was homogenized milk gallon-size glass container, where they received a 4-cents-a-gallon reduction in price.

Q Now, Mr. Bitting, was this the only item to which the rebate was applied, according to the information you had?

A For the 6-month period of October 1966 through March of 1967 it is the only item.

Q So the other items appearing on CX-191-C through -P all appear as the net prices at which they were billed?

A That is correct.

Q Now, what documents did you use in the preparation of CX-191-C through -P for identification?

A I had the Borden Company invoices to the Model Food Center at Hammond, I had the Borden Company invoices to the A & P stores in Hammond, I also had certain rebate memos in the form of check registers. Those were the main documents used.

Q And did you have any worksheets that had been provided by Borden concerning the computation of the rebate in these instances?

A I did.

Q Did you check out the computations on those worksheets with computations of your own?

[***

of Borden's Counsel, dated February 24, 1971, with attachments.

Q Now is the information in the attachment or in the letter, sir?

A The information is in the attachment.

Q What is the attachment, sir?

A The attachment is a copy of Borden's rebate worksheets.

Q Did you use any other information, sir, in computing the rebate data in connection with this Title store?

A Yes, sir, I did.

Q What information was that, sir?

A There were copies of rebate memoranda in the form of check registers which I had received from the Borden Company as a result of the investigational hearing in November of 1970.

Q Now, I take it you also had the invoices to this Title store for these months; is that correct?

A The invoices were available and used.

Q Now, did you prepare any calculations of your own to check out this application of the rebate in the manner of four cents per gallon on glass and paper, and two cents for half-gallon on paper?

A Yes, I did.

Q And did your calculations verify the method shown in the Borden work papers?

MR. FOLEY: Objection to the question, and in particular to the use of the word "verify."

***

***

tabulations in Commission Exhibit 198-C through Z-13?

A It has.

Q Now calling your attention to the net price figures appearing for Tittle, the Tittle net price line on these various sheets. Has there been any difference in the computation of that line as compared to Commission Exhibit 198-C through Z-13?

A I arrived at the net price which Tittle Valparaiso store paid on a similar basis to CX 198.

Q What discount or rebate, what percentage or type of rebate did you apply to the Tittle prices to arrive at the prices on this exhibit?

A The information I had been supplied for the business rebate records for this store supplied by Borden's counsel indicated that this store was billed on a net price basis. There were no discounts or rebates. Therefore, the price which appears on CX 198-C to the Z-13 would be the actual invoice price from Borden billings to the Tittle Valparaiso store.

Q And were there any rebate records or any check register receipts included in the documentation which had been supplied to you showing the identity of this Tittle store, that is the Tittle Valparaiso store?

A There had been no rebate records supplied to me for this store.

Q Now, calling your attention to Commission Exhibit 198-A,

***

[***

received from Borden's counsel was that the store no longer purchased from the Borden Company after December of 1969.

Q Now, could you indicate to us, sir, the check register receipts to which you referred that you stated you used in the preparation of this net price?

A The check registers for the period of October through December 1966 are in these bound temporary buff files. The check register for the period of January through March 1967 are in my hand marked as CX 105 at the investigational hearing on November 19, 1970. The check registers for the period of June 1969 through December - 1969 are in my hand marked as CX 108 at the investigational hearing on NOvember 19, 1970.

d lyj
s fols.

[***

By Mr. Mathias:

Q Under each of the individual items appearing in each of these tabulations on the second line, are the prices during the second period, that is, January 1967 through March of 1967 generally lower than those appearing in the October through December 1966 period?

A They are lower during the January through March 1967 period.

Q Now, in the period October through December 1966, how did you arrive at the net prices appearing on these tabulations, that is on CX 202-C through I?

A I had the Borden billings to the Wilco Food Center. I also had the check registers from the Borden Company to this customer. I also had the supplemental worksheet provided by the Borden Counsel to reconcile the rebate dollar amount paid.

Q This, again, is the document to which we have previously referred as the detail rebate sheet received from Borden Counsel, a series of which has been marked for identification as Respondent A&P's Exhibit 5?

A That is correct.

Q Now, in what manner was the net price arrived at? Was this by a percentage basis or was it by a cents-off basis? How did you compute the net price in the case of Wilco?

A I related the rebate amount for the four or five-week month to the applicable sales for that period.

***

JUDGE HINKES: The hearing will be in order.

I believe that you are prepared to present your next witness, Mr. Mathias.

MR. MATHIAS. That is correct, Your Honor. I would like to recall R. John Bitting.

JUDGE HINKES: Mr. Bitting, I presume that perhaps that would be the best place for you to sit there as a witness.

You have been previously sworn, Mr. Bitting, so you are still under oath.

THE WITNESS: Yes, sir.

--

xx R. JOHN BITTING was thereupon recalled as a witness for the Commission and, having been previously sworn, testified as follows:

JUDGE HINKES: You may proceed.

MR. MATHIAS: Your Honor, it is my intention to re-examine Mr. Bitting on a number of documents as to which he has already testified at some length in his earlier appearance and that is the price comparison chart which had been marked for identification as Commission Exhibit 188, 191, 194, 200 and 202.

Before questioning Mr. Biting however, I think certain developments of record that pertain to his previous testimony should be mentioned. Certain documents which were referred to in Mr. Bitting's earlier testimony concerning these exhibits as rebate work sheets of Borden and at other times as detailed rebate records, which were also identified as respondent A&P exhibit number five, have since been received in evidence in this matter as Commission exhibit 288A through X.

Mr. Bitting also mentioned in connection with the period January to March of 1970 certain documents entitled "Request for special sales special check." These documents have been received in evidence as Commission Exhibit 289A through C.

Also, there was mention of certain rebate check memoranda for the period October through December 1966 which have also been received in evidence as Commission Exhibit 265A through V. In connection with this set of exhibits there were also certain Borden forms requesting these checks entitled "Request for special sales special check" which had been received as Commission Exhibit 267A through C.

With that background I would then like to question Mr. Bitting concerning Commission Exhibit 188A through Z13.

DIRECT EXAMINATION

By Mr. Mathias:

Q Now, Mr. Bitting, you have previously testified concerning the manner of your preparation of the summary price comparison chart which has been identified as Commission Exhibit 188A through Z13. In the course of that testimony it was decided that certain changes were to be made in these charts.

Referring now to Commission Exhibit 188C through Z13, can you explain in general the changes which you have made in these charts?

A In general I eliminated the non-private label products purchased by the A&P stores resulting in the elimination of four or five products at the beginning of the October 1966 period. The tables as they are now set up cover the common items which we defined before as items purchased by the Burger's market as well as by the A&P store in Hammond now showing that only the private label products were considered in the A&P purchases.

This elimination process was done by deleting on the 188C through Z13 these products by striking through them with a heavy black pen. As far as the other part of the elimination was concerned, on my work sheets which provided the information for the bottom half of each weekly data sheet I pulled out the same Borden label products and arrived at new totals.

These totals are represented by my handwritten figures on the bottom half of each weekly period information.

Q When you are talking about these figures on the bottom half of each weekly period you are referring to those figures behind the titles "total net billing to Burger's of its purchases of these items, billing of Burger's had been charged prices paid by A&P for these items, dollar discrimination (overcharge) and percent of discrimination (overcharge)", is that correct?

A That is correct.

Q Now was any change made in the title on Commission Exhibit 188C as previously described in your testimony?

A There was a change made. I eliminated the title entirely as represented by the black line which is shown at the top of page 188C for the six month period of October 1966 through March 1967 as well as on CX ~~188~~ 188-Q which for the 10 month period of June 1969 through March 1970.

There is also an additional elimination on each weekly reported item of information as far as the number of items in the first line of the four lines underneath the detailed information for each week. I eliminated the number of items by drawing a black line through the previously reported number.

Q Referring to Commission Exhibit 188A, what change, if any ---- strike.

Going back to 138C through Z13, in all other respects was your manner of preparation of these pages the same as that which you previously described in your prior testimony?

A It was the same.

Q Now referring to Commission Exhibit 188A, what changes, if any, did you make in this exhibit, sir?

Q Referring to CX 188A, footnote one, you state "only private label product considered in A&P purchases". Could you elaborate on that statement and explain it further? I am not exactly clear what you mean by that.

A The common items were the items purchased by the Burger's market for a particular week and similar items purchased by the A&P store for that same week under the private label program.

Q The first thing then in order for an item to be what you call a common item is that that item must have been purchased by A&P under the private label arrangement? Is that correct?

A Yes, sir.

Q In addition to that, that item must also have been purchased by Burger under the Borden label, is that correct?

A That is correct.

Q Am I also correct in stating that the term "does not include an item purchased by both A&P and Burger unless that item was purchased by A&P under private label", as your chart is now presented to the Court?

A The chart that is now presented only covers A&P private label purchases.

Q Let me repeat my question again. Am I correct in stating that the term "common item" as you used it for CX 188A as revised does not include an item purchased by both A&P and other Borden customers unless the item was purchased by A&P under the private label program?

A Yes, sir.

Q Now turning to 188B, briefly, the second column, Borden net sales of common items, is this figure obtained by adding up the appropriate number of total net billings to Burger's of its purchases of these items on the part of the exhibit beginning at 188C?

A Yes, sir.

Q Now on 188C and following parts these total net billings are indicated weekly, are they not?

A Yes, sir.

Q And on 188B the total of net sales of both all items and of common items are indicated monthly, is that correct?

A Yes, sir.

Q Now I believe at the previous testimony you testified that each month included either four or five weeks worth of sales. Is that correct?

A Yes, sir.

Q Could you explain how for the tabulation exhibit 188 you determined whether to include four or five weeks in a particular month?

A We had several ways of determining that. One, we had certain correspondence with the Borden Counsel showing that.

Q As far as correspondence with Borden Counsel, which has hearing which is not an exhibit in this case. He is talking about check register forms, the copy of a check. I believe Mr. Foley is getting confused.

MR. FOLEY: Yes, I was.

By Mr. Foley:

Q Do you have a copy of a check register to Burger which gives a rebate to Burger from Borden for the months of January, February and March 1967? Is that right?

A That is right.

Q My question is do you have any document which tells you how to allocate that rebate among the items purchased by Burger from Borden?

A We don't have a document.

Q You have no document?

A We have no document.

Q How did you allocate the rebates for January, February and March 1967?

A On the same method which I used in the prior three months to verify the information that was on the detailed work sheets for Burger's for October through December 1966, CX 288.

Q You say on the same method. Did you take the amount of the check register and divide that figure by the total purchases by Burger from Borden of milk product for the month in question to obtain a percent rebate?

A I did it on the same basis, not a month basis. I did it on a four week month basis, for January, February, and for March it turned out to be a five week month basis. I used the same procedure that I used in the prior three months.

Q Which was to divide the amount of the rebate check by the total net pruchases from milk products by Burger, is that correct?

A That is correct.

Q What percentage discounts did you obtain for January, February, and March 1967?

A For January 1967, using this rebate memo in the form of a check register, relating that amount to either the total amount or the net amount which was described earlier after bottle adjustment, the percentage came out to 7.5 percent.

For February using the appropriate rebate memo in the form of a check register, applying that to the total four weeks purchases by Burger's from Borden, either on a total amount or a net amount, which is the after the bottle adjustment figure, the percentage came out to 7.6 percent.

Likewise on the five week month ending the end of March, 1967, using either the total amount or the net amount, relating the amount of the appropriate rebate memo in the form of a check register, the percentage came out to be 7.5 percent.

Q But you had no document, did you, Mr. Bitting, either in CX 288A, or requests for special sales special checks or any other document of the Borden Company which were previously identified by witnesses in this case that enabled you to determine how to allocate those 7.5, 7.6 and 7.5 percent discounts?

MR. MATHIAS: Your Honor, I am going to object to the form of that question. The witness is now being cross-examined. This is going beyond voir dire and he is being asked to explain how he prepared the document.

Mr. Foley has already ascertained that there were no rebate work sheets for these three months. Now I believe we are getting into argument and cross-examination.

JUDGE HINKES: Of course, the authentication of documents may involve going into such factual background. I am not sure that this is not sufficiently tied into authtication to prevent it from being considered a proper part or voir dire. Mr. Foley?

MR. FOLEY: Your Honor, I would feel it is a proper part of voir dire because it is in my opinion directly tied into the question of authentication which has been argued at great length in these proceedings. All I am asking the witness is to establish that he does not have work sheets which tell him how to allocate the rebate memo which he used in preparing CX. 188A.

My question simply is, does he have any documents from the Borden Company which have been previously identified by witnesses called at this hearing. If the answer is yes or if the answer is no, I think it goes directly to how he prepared this exhibit and whether it should be admitted or not admitted.

JUDGE HINKES: It would appear that that is a proper authentication inquiry. I will allow it to continue.

MR. FOLEY: Thank you.

By Mr. Foley:

Q Mr. Bitting, do you have the question in mind or would you like me to rephrase it?

A The question is do I have any documents that would ---

Q --Tell you how to allocate the rebate for January, Feburary and March of 1967 to Burger's.

A There are no documents. There are other means though that I followed as I described earlier.

Q The other means that you followed, did they essentially involve the assumption that the practice followed in 1966 for which you do have work sheets of applying the rebate to all items proportionately was also followed in 1967?

A Yes.

Q Do you have any other means than that?

A For the later period, for the ten month period, we had information that indicated that for the period of June 1969 through December 1969 the method used in that period also applied to the following three month period. I thought I was on right grounds.

Q Now other than the fact that the rebate was allocate proportionately among all items in the three months of 1966 and the seven months of 1969 for which you have Borden work sheets, other than those two facts do you have any other basis for stating that the rebates in January, February and March 1967 were allocated proportionately among all items purchased by Burger?

A There were a number of companies receiving certain cents off on certain products during the October through December 1966 period. These companies I was also able to reconcile, in most cases right down to the penny, the cents off for the January through March 1967 period, the discounts method that I used for the three month period ending December 1966 would be carried through to the three month period ending March of 1967.

Q In the course of preparing Exhibit CX 188 and the other exhibits that you have prepared concerning Borden's Indiana customers, you had occasion, did you not, to examine a considerable amount of Borden data on rebate, cents off discount policy in general, did you not?

A Yes, sir.

Q Did you not discover from that that Borden's discount practices and rebate practices varied from customer to customer?

A They did vary as far as the method of calculating the discount was concerned.

Q And in fact for the same customer did it not vary from time to time?

MR. MATHIAS: Your Honor, I am going to have to object. I believe we are getting beyond the voir dire on this particular exhibit. If Mr. Foley wishes to question the testimony of the Burger witness possibly this would be correct, but to question him concerning the practice of Borden rebating to a number of different customers, and we are discussing here the rebates to Burger's, I believe is improper on voir dire.

MR. FOLEY: Your Honor, of course I think we have established, Mr. Bitting has acknowledged, that there are no documents from Borden which tell him how to allocate the rebate check that Borden sent to Burger for 1967. He has testified that he has done that on the basis of various assumptions, one of which he, himself, mentioned was referring to other customers, and the practices that he has observed where he did have data available as to how Borden was behaving. What I am probing now is the validity of that assumption which is the underlying predicate for his exhibit 188.

If that assumption is without merit or without value, then that would greatly undermine the value of the exhibit itself and it should not be admitted. I think it is appropriate.

JUDGE HINKES: Yes, I will allow it. This goes to the admissability of the document really.

By Mr. Foley:

Q Did the Borden discount policy, as you observed it from examining the Borden documents available to you, not vary from time to time, not just between customers but for the same customer.

A It did vary.

Q It di?

A Among certain customers.

JUDGE HINKES: You made the assumption here that it didn't vary from 1966 to 1967, for example.

THE WITNESS: For this customer, Burger's market, yes.

JUDGE HINKES: On what basis did you make that assumption?

THE WITNESS: The fact that the discount rate was consistent for the three months ending March 1967 with the 10 month period of 1969. In fact with the exception of one month, and that was only out one tenth of one percent, the percentage was the same for the 13 month period.

By Mr. Foley:

Q Mr. Bitting, didn't the discount or rebate that you used for Burger's go from 5.9 percent in November 1966, to 9.3 percent in December 1966?

A Yes, sir.

Q Did it not drop back in January 1967 to 7.5 percent? /

A That is correct, for those three months plus the 10 month period in 1969 and 1970 it was 7.5 percent with the exception of one month when it was 7.6 percent.

Q Would not the variation in the percentage discounts utilized by or granted by Borden to Burger's during this period indicate to you that Borden was giving discount to Burger on certain special items only in addition to a regular across the board discount?

A No, it would not. The percentages were so consistent over a long period of time like that.

Q Well, the percentages were 7.5 percent throughout the period of 1969, I agree with you. That is the figure you used.

A And the first three months of 1970.

Q And the first three months of 1970, in that 10 month period. But in the period from November 1966 through January 1967 the percentage discounts were not consistent, were they, Mr. Bitting? They varied?

A Yes, sir.

MR. MATHIAS: Your Honor, for the sake of expediting things I believe if we could have a brief discussion on the record with the witness not present, if the witness would step outside of the room, I would not want to be accused of coaching the witness, but I would like to put a statement on the record that might end this lengthy line of questioning and expedite matters.

JUDGE HINKES: Yes. That might be helpful. Would you step out of the room, Mr. Bitting, please?

(Witness was excused from the hearing room.)

MR. MATHIAS: Your Honor, in addition to Mr. Bitting's assumption in connection with this particular witness, there is additional testimony in the record by Mr. Kristoff from Burger's appearing at page 2279 of the transcript in which Mr. Kristoff states the method of rebating by Borden to Burger's during the period 1966 through 1970 -- for the record I might note Mr. Kristoff's name is spelled K-r-i-s-t-o-f-f --

And during that period Mr. Kristoff stated he received a rebate based upon a percentage of the total purchases once a month. This was for the entire period. So if in fact he was paid a percentage of his total purchases during this entire period, this would support Mr. Bitting's supposition under which he has taken the rebate and applied it as a percentage of the total purchases.

So in view of this additional evidence in the file it would seem to me that to belabor the record with very extensive questioning as to whether or not there was any grounds for Mr. Bitting's supposition is unnecessary.

JUDGE HINKES: In any event the record contains Mr. Bitting's explanation, such as it is. The record also allegedly contains a statement which would support the theory upon which Mr. Bitting acted. I see no point in further examination of Mr. Bitting in this respect inasmuch as there is nothing else that he can tell us about the document and apparently the document is authenticated by the statements of Mr. Kristoff.

MR. FOLEY: Your Honor, if that is established, at least Mr. Bitting'ss own knowledge, his own records, he does not have records which enable him to allocate the rebate in 1967, then that is fine. If the support of that allegation is Mr. Kristoff's testimony, as it may be, if that is the basis for the exhibit and that is understood, then I will have no more questions in this area.

MR. MATHIAS: Your Honor, of course I would not want to exclude Mr. Bitting's own testimony as to how he arrived at it either.

JUDGE HINKES: The record may be used to authenticate a document, not merely the statement or testimony of a particular witness or the calculations of a particular witness. However, with respect to this particular witness, Mr. Bitting, voir dire is limited to what he did and an objection raised to the authenticity of the document he offers would have to therefore be based on the entire record and not necessarily limited to Mr. Bitting's testimony.

MR. FOLEY: Yes, I agree.

JUDGE HINKES: I think we can call Mr. Bitting back.

MR. MATHIAS: I am sorry for the interruption but I thought that might expedite matters.

JUDGE HINKES: Yes. Thank you.

(Mr. Bitting resumes the stand.)

JUDGE HINKES: You may continue, Mr. Foley.

By Mr. Foley:

Q Mr. Bitting, I showyou a copy of respondent A&P exhibit 22A through H for identification only. Now respondent A&P receiv ed these documents from Complaint Counsel, Mr. Mathias.

Have you seen these documents before this preparation of your Exhibit 188, Mr. Bitting.

MR. MATHIAS: Your Honor, I am going to object to the form of the question. I think it should be the use of these documents in preparation. We are questioning now on voir dire what he has done in the preparation of a certain summary document, whether or not he had seen another document.

There has been no indication in the testimony up to this point that he has used this document. I would object to the question as to whether or not he had seen the document.

MR. FOLEY: That was really my question, have you seen the document before.

JUDGE HINKES: To make it quite clear, the question is appropriate if you are seeking not to get this document in evidence.

MR. FOLEY: I am not.

JUDGE HINKES: This is not the proper point for that purpose. You are now engaging in voir dire on Commission Exhibit 188. You can ask the question relating it to 188 rather than simply asking is this the document used in connection with 188 or is it not.

By Mr. Foley:

Q Did you use this document in connection with the preparation of Exhibit 188?

A I did not.

Q Mr. Bitting, in connection with the preparation of Exhibit 188, did you have a check copy for each of the months of November 1966 through March 1967?

A I said November ---

Q I am sorry. Do you have a check copy from the Borden Company to Burger's for each of the months October 1966 through March 1967?

A I do.

Q Actually these copies are dated NOvember 1966 through April 1967, are they not?

A Yes.

Q And you have only one check copy for each of these months, is that right?

A Yes, sir.

Q Did you also have a check copy for each of the 10 months June 1969 through and including March 1970?

A Yes, sir.

Q Is there one and only one check copy for each of these 10 months?

A That is correct.

Q Now directing your attention to respondent's A&P Exhibit 22A through H, do the amounts shown on the face of the rebate check for the first six months of your comparison also appear on respondent A&P's Exhibit 22A through H?

A I will have to check that. I have never made that check.

MR. MATHIAS: Your Honor, I am going to object.

MR. FOLEY: That was one of the reasons for my questioning whether he had seen it or not. Obviously he had reviewed it. There were red marks on it. I was wondering whether he used it. It is a document which could have been used in assisting him in the preparation.

JUDGE HINKES: Yes, but he did testify he did not use it in connection with 188.

MR. FOLEY: Of course the use of the word "use" is somewhat, as are so many of the English words, ambiguous as to whether he used it in the sense that he transposed a

Q Now, in computing the rebates for January through March of 1967, what method did you use to apply the rebate check from Borden to model for this period of time?

A For the month of January, 1967, using only the glass container units, homogenized milk, gallons, times four cents per unit, I came out to the exact amount of the rebate check. For the month of February, using the glass containers, I came out to a slightly lesser number of units than would be arrived at by taking the four cents into the amount of the rebate check.

However, discussing this with Complaint Counsel it was decided to give A&P the advantage of the full number of units which appear on the invoice times the four cents which, of course, results in a lower discrimination for this month.

For the month of March 1967, which happened to be a five week month, the total number of homogenized gallon glass units times the four cents per unit gave us a figure which was the exact amount of the rebate check for that month.

Q Now, I am not quite sure of your explanation of what happened in February. It is my understanding, if I am wrong, correct me, that in February by taking the number of glass gallon units as revealed by the invoices and multiplying them by the four cents you would come out to a greater amount than appeared on the rebate check, is that correct or am I wrong?

A I may have misstated a few minutes ago what I did there. If you take the number of units for the homogenized gallon glass containers as they appear on the invoices, you come out to a greater number of units than you do by taking the amount of the rebate check and dividing it by four cents.

Q What was the amount of the rebate? Do you have the figure there for the month of February?

A The amount of the rebate for February 1967 was $49.36. You take the four cents per unit into that and you arrive at a total number of units for the month of 1234. By taking the invoices for the four week period you arrive at 1328 units.

Q That would be a greater number of units than ---

A ---represented by the rebate check.

JUDGE HINKES: How much did you allow then as a rebate?

THE WITNESS: The greater amount.

JUDGE HINKES: 1300 times four.

THE WITNESS: Yes, 1328 times four.

By Mr. Mathias:

Q This would have been on your original price comparison charts in which you included the glass gallon jug. Your present revision does not include the glass gallon jug, is that correct?

A That is correct.

MR. MATHIAS: I offer Commission Exhibits 191A through Z13, 194A through Z13, 195A through P, 196A through Z13, 197A through Z13, 198A through Z13, 200A through Z4, 202A through Z13 in evidence.

MR. SHAEFER: Are you limiting that with respect to count three?

MR. MATHIAS: Again, my offer insofar as any of these documents go beyond the period ending December 31, 1968, the offer does not go towards count three of the complaint.

JUDGE HINKES: Very well.

MR. FOLEY: Could we take a five minute recess?

JUDGE HINKES: Yes, we will take a five minute recess.

(A short recess was taken.)

JUDGE HINKES: The hearing will be in order. Mr. Foley.

XXXX

VOIR DIRE

By Mr. Foley:

Q Mr. Bitting, in reference to Exhibits 191, 194 through 198, 200 and 202 -- I will address my question at this point to all of them at the same time -- I understand that the net billing, as you used it on these exhibits 191, etcetera, you have separate formulas to calculate the different net billings, is that correct, on each one of the exhibits?

A Yes, sir.

Q They are not the same as the one for Burger necessarily?

A No, sir.

Q Now with the exception of those items, net billing, are all of the other terms that appear on all of the exhibits the same and do they have the same meaning as they have on the Burger exhibit CX 188?

A Yes, sir.

Q Now, Mr. Bitting, did you have any rebate memo for check registers for Model for the period for which you made your comparison for Exhibit 191?

A I had check registers for certain parts of the 16 month period.

Q What part is that?

A The first six months, October 1966 through March 1967 series.

Q You had no rebate check for the second comparison period?

A That is correct.

Q Actually, Mr. Bitting, did you use the rebate check copy which you had for October 1966 through March 1967 in arriving at the Model net prices that you have listed on Exhibit CX 191?

A I only used them for verification purposes to insure that the amount of the rebate tied in with the cents off per product.

Q And for February 1967, the month of February 1967, if I recollect your testimony a few minutes ago, you testified that the number of units for glass gallons from the invoices did not correspond with the figure that one would obtain by dividing the amount of the rebate check applicable to February 1967 by four cents.

A That is correct.

Q I take it by that you are referring to the rebate check to Model Food Market dated March 19, 1967 which shows that the amount of the invoice was an amount of $49.36?

A I have that amount noted in my notes. I don't have the date. Yes, that is correct.

Q That is the amount of the rebate which you concluded the Borden Company applied to Model's milk purchases for the month of February, 1967, is that correct?

A That is correct.

Q Now if you were to divide $49.36 by four cents you stated you would obtain 1,234 gallon units.

A Yes, sir.

Q When you added up the number of glass gallon units on the Borden invoices for that same period you say you obtained 1328 glass gallon units, is that correct?

A Yes, sir.

Q For February 1967, how did you determine that the rebate was to be allocated in its entirety to glass gallon containers by subtracting four cents from the invoices price?

A I determined that by adding the units purchased in paper containers, and taking that total for the month of February times the four cents I came out to a considerably larger amount than the difference between the $53.00 and the $49.00.

Q I direct your attention to page CX 191C. One of the items that you compare, common item, on CX 191C is gallon of homogenized Vitamin D milk, is that correct, Mr. Bitting?

A That is one of the items.

Q I take it that that is a paper gallon although it does not say that on the exhibit, CX 191C, is that correct?

A It says that on the exhibit.

Q I am sorry, your correct. That word paper refers to all of the items there, is that right?

A That is right.

Q So, are you saying that for the month of February 1967 you subtracted four cents from the invoiced price to Model of the gallon item of milk in the paper container?

A No, that is not the answer.

Q Did you credit A&P, as you have used the word, did you credit A&P in any way with the $49.36 reflected in the rebate to Model for February 1967 in order to reduce the net price paid by Model on the common items you are comparing?

MR. MATHIAS: Your Honor, I object to that question. How is he going to credit payment to Model to A&P?

MR. FOLEY: He spoke about making calculations in such a way that it would be to the advantage of A&P. That is what I am pursuing.

MR. MATHIAS: That testimony was later corrected in response to a question of mine. It was pointed out that this testimony was related to his earlier exhibit prior to revision where glass gallon units were included in the exhibit.

MR. FOLEY: I will withdraw the question.

By Mr. Foley:

Q Mr. Bitting, am I correct in saying that what you did was take the rebate checks that were paid by Borden to Model and determine that those rebate amounts were all allicable to glass gallons of homogenized Vitabmin D milk.

A Yes, sir.

Q And the allocation that you applied was to subtract four cents from the Borden invoiced price to Model to arrive at the net price paid by Model for a gallon glass of homogenized Vitamin D milk?

A On the original tabulation that was the procedure. That glass container, of course, does not appear on this revised 191C.

Q Therefore, none of the amounts of money appearing on the rebate checks to Model are reflected in the tabulation on Exhibit 191A through Z13?

A That is correct.

Q Now with reference to the month of February 1967, how did you allocate the rebate of $49.36?

A That rebate would not be reflected on the revised tabulation.

Q Once again you subtracted four cents, you assumed that it was a four cent deduction from the invoiced price per gallon on glass jug homogenized Vitamin D milk, is that correct?

A Yes. And that is not reflected on the revised table.

Q Now for the other months for which you were able to make the comparison, that is for the months of October, November, and December of 1966 and January to March 1967, when you divided four cents into the rebate for that particular month did you obtain the same number of glass units as you obtained by checking the Borden invoices?

A I came out with the exact same number of units.

Q The only time you did not was February 1967?

A That is correct.

Q So in effect, Mr. Bitting, for the first comparison period, October 1966 through March 1967, all of the Model net prices listed on your Exhibits 191C, etcetera, are the invoiced prices to Model?

A Yes, sir.

Q Other than the glass gallons of homogenized Vitamin D milk did you discover in your analysis and examination of Borden documents pertaining to Model any indication of any

P R O C E E D I N G S

JUDGE HINKES: The hearing will be in order

I believe that you were engaged in voir dire of Mr. Bitting, Mr. Foley.

MR. FOLEY: Yes, sir.

JUDGE HINKES: You may continue.

- -

R. JOHN BITTING resumed the stand and testified further as follows:

VOIR DIRE

By Mr. Foley:

Q Mr. Bitting, I believe that yesterday afternoon you told us that the net price, Model net price which appears on Exhibit 191 was taken by you directly from the Borden invoices to Model, is that correct?

A Yes, sir.

Q Did you have any check registers or rebate checks for the months June 1969 through March 1970 for Model?

A I did not have such rebate checks for that period of time.

Q Did you have any of Borden work sheets for Model Food Center for the months of January, February and March 1970?

A I had a form of rebate work sheet in the form of a request for special sales expense check from Borden.

Q And the request for special sales expense check you say

***

w20 By Mr.Foley:

Q Were you present, Mr. Bitting, when Mr. Minard from Tittle testified?

A I was.

Q Page 3252 of the transcript you stated, Mr. Bitting, I believe that there were no other rebates paid to the Tittle store at Valparaiso, Indiana. On page 3252 there is an indication that Mr. Minard, making reference to Respondent A & P's Exhibit 30 or 31, I am not sure now, were his ledger sheets, when questioned about certain dollar payments, one of them for $65.49 and the other for $25. for the Tittle store at Valparaiso. Would that change your answer that you gave a minute ago that there were no other rebates paid to Tittle for the Valparaiso store in the relevant time period?

A It would not change my testimony. I did not consider this $25. payment which I believe Mr. Minard from Tittle described as a possible demonstrator allowance. I did not consider that or would not consider that as entering into the computation of net price.

Q ..How about the item of $65.49? Is the same thing true of that, you don't consider that a rebate?

A I would have to refer to the ledger sheets.

Q All right.

MR. MATHIAS: Your Honor, I would object to the w21

ledger sheets being brought into the examination of this witness since it has not been established that the witness used the ledgar sheets or that it has any bearing on the preparation of this document and it is not in evidence.

JUDGE HINKES: I would assume that your question should be limited, Mr. Foley, to simply whether or not he included or took into account that particular check in his calculations. That is all that would be involved here.

MR. MATHIAS: Your Honor, I also would like to note that the record in no place establishes that this $65.49 payment had anything to do with the Valparaiso store.

JUDGE HINKES: Be that as it may, this may all be developed on cross-examination and redirect, but not on voir dire.

By Mr Foley:

Q Did you take into account in calculating the net price for Tittle of Valparaiso this payment of $65. and some odd cents?

A I didn't take into consideration that item.

May I ask you what the amount was?

Q $65.49.

JUDGE HINKES: This might be an appropriate time to take a short recess.

(Brief recess.)

fls

***

be 28 percent, is that right?

A The worksheet indicates 28 percent based upon a different base than I used.

Q For November 1966, you testified you used the discount or a rebate of 27.9 percent applied to each item purchased by Wallies from Borden during that month of November 1966? Is that correct?

A That is correct.

Q I direct your attention again to CX-288-D for the entry for November. How does that worksheet indicate that Borden calculated the rebate for November 1966 for Wallies?

A They arrived at the sales figure of $4638.07 by adding the four weeks of November, that is the week ended November 5, November 12, November 19 and November 26, together, which is the net amount after the bottle adjustment, which is different from the method I used.

Q They used an across-the-board discount of 28 percent, is that correct?

A That is correct.

Q And in addition to that, did the Borden Company not allocate a special rebate of five cents for, I am not really sure I understand the item, it says one-half PXX $10.70 add half-gallon two percent, it looks like 13 cents, resulting in a total rebate of $23.40?

A Yes, sir.

Q What did you do with those rebates of $10.70 and $23.40?

A As far as the rebate of $23.40 is concerned, that does not enter our tabulation CX-200. As far as the one-half pint or one-half PXXX, five cents, I understood that to be whipping cream and I made certain adjustments in the week ended November 19 and the week ended November 26, which are on page CX or Commission Exhibit 200-F for this particular product of whipping cream.

Q When you say you made certain adjustments, did you reduce the invoice price by five cents for whipping cream? Is that the adjustment you made?

A It is a little more complicated than that.

Q That seems to be what ~~$~~CX 288 indicates that Borden did. It multiplies 214 items of this whipping cream by five is to arrive at $10.70, does it not?

A That is correct. However, the first part of that line indicates that it was applicable, the reduction was applicable to the period November 18 through November 26. That covers the two periods for the weeks ended November 19 and November 26. So, it turns out that on November 19, the Borden Company sold to Wallies Market 22 units of whipping cream and on November 26, they sold 196 units of whipping cream. That is a total sales during this two-week period of 218 units.

The information on CX-288 for the period 11-19-66 shows that for 214 units of this product, the Wallies store received from Borden a rebate of five cents. In order to allot this rebate for the weekending November 19, 1966, I used four units of the 22 units purchased at the regular price and the other 18 units I showed as a reduction of five cents a unit.

You refer to CX-200-F. Under the week ended November 19 on the second line, Wallies net price, I show as two prices covered by a footnote; one which shows that Wallies received an additional rebate of five cents per unit on some purchases of this item.

In this case, some of the items were sold at .3208. Some of them were sold at five cents less or .2708.

For the week ended November 26, 1966, since Wallies purchased 196 units, I used the full 196 units at the reduced price of five cents a unit. That is covered by the information in the bottom half of CX-200-F for the week ended 11-26-66, showing a net price of 2708.

It also notes in Footnote 2 which states"the price reflects additional five cents rebate on each unit." For these two reduced prices, I cam up to 214 units which ties in with the information on CX-288.

Q In other words, you did apply a reduction in the price of $10.70 to the monies paid by Wallies to Borden for one-half pint of whipping cream during the month of November 1966?

A Yes, sir.

Q You said the other item of $23.40, the half-gallon of two percent, did not enter into your calculations. Is that because a half-gallon of two percent was not one of the common items for the month of November, 1966?

A That is correct.

I might add that this item of $23.40 is applicable to the dates whown here on CX-288-F, 11-30-66, which would throw it into the December picture for the week ended December 3, 1966, since the four-week period, four-week month of November ended 11-26-66.

Q Even though Borden cented out in connection with the rebat for November?

MR. MATHIAS: Your Honor, I would like to make a point of clarification on the record. Mr. Foley has read this entry on CX-288-D as being 180 half-gallon, two percent milk. I am not so sure that is the -- it is two percent. It appears to me, although it is not completely clear on my copy, that this is two percent nog.

THE WITNESS: My determination is that it was applicable to eggnog, nog.

MR. MATHIAS: Eggnog, as I understand it, is not one of the common items appearing on CX-200-G.

By Mr. Foley:

Q In any event, it did not go in because it was not one of your common items?

A That is correct.

Q As I look at the Borden worksheet CX-288-D for Wallies, does that not suggest to you that Borden paid its rebate checks to Wallies on a monthly basis rather than on a four-four-five-week basis that you have been using?

A No, it does not.

Q On December 13, 1966, do you have a rebate check from the Borden Company to Wallies Market?

A That date was December 13, 1966.

Q Yes, and the amount is $1,332.75.

A May I see a copy of that? The amount of the rebate check which is dated December 13, 1966, is for $1,332.75.

Q Does that amount not correspond to the exact cents with the Borden worksheet calculations for the month of November 1966?

A That includes the cents-off items as well as the across-the-board.

Q Yes, it does, but the figures are exactly the same, are they not?

A Yes, sir.

Q November 30, one of those cents-off specials, was a $23.40 item you have just spoken about which was apparently credited or paid by Borden for November 30 purchases, is that correct?

A That is right.

Q On the basis of that, how do you say that Borden was paying its rebate in December only for the four-week period that you earlier gave us for November 1966?

A Because if I add up the weekly invoices for the four weeks in November 1966, I arrive at a net amount of the same exact figure which they show here of $4638.07, which is an indication that they are billing the Company on a four-week basis.

Q For December 1966, you testified that you applied a 27.6 percent rebate on all items purchased by Wallies to arrive at net price, is that correct?

A Yes, sir.

Q Once again, the Borden worksheet for December indicates that rebate of 28 percent on all items, does it not?

A Yes, sir.

Q In addition, there is a rebate for December of $26.10, is that right?

A That is correct.

Q To what item is that rebate attributable?

A The $26.10 is attributable to the half and half pints.

Q Is that $26.10 reflected on your calculations for the week ended December 24, 1966?

A It is reflected on my calculations in CX-200-H where, for the week ended 12-24-66, I have a Wallies net price of .2649. There is a footnote "Price reflects additional five cents rebate on each unit." Also on the CX-200-I, which is for the week ended 12-31-66, Wallies' price is .2649 for half-and-halfpint with a footnote which states "Price reflects additional five cents rebate on each unit."

This was another case similar to the prior case for the whipping cream in the previous month where the purchases were applicable to a two-week period. There was an overlapping period. So, I had to make a split between the quantities purchased of half-and-half pints during that two-week period.

The split was for the week ended December 24, 1966, 36 units at the regular price and 150 units at the reduced price of five cents off. December 31, I used the total quantity purchased from the invoice information of 372 units. You add the 150 and the 372 units at the five cents off and you arrive at the 522 units noted on CX-288.

Q Can you explain to me on CX-260-H why it is that you have two columns headed "H & H Pints?"

A You are speaking of the week ended December ---

Q 17, 1966, and December 24, 1966.

MR. MANHIAS: Your Honor, I believe the witness has just answered that question in explaining that he used two separate prices during that week, that he credited a certain portion of the items at the regular price and a certain portion of the items at the cents-off price in order to correspond with the Borden rebate memo.

I really believe that we are getting into too much detail on this voir dire as to each individual figure. I do not believe that this is the purpose of voir dire. I think Mr.

That was strictly an across-the-board ---

Q But it was not applicable in November and December?

A That is correct.

Q Turning to the second comparison period, the period for June 1969 through November 1969, how did you obtain the net prices in this period?

A Using the worksheets, rebate worksheets which are CX-288, for the appropriate time period, I first reconciled the total amount of sales on either a four- or five-week-month basis. Here during this period, the Borden Billing Department switched over and used on 288 the total amount which of course excludes any bottle adjustment.

I reconciled each month with the figure which appears on CX-288 for the period of June through November 1969 and related the amount of our rebate check to this total amount which is prior to any bottle adjustment and for each of the months of June through November, arrived at a 30 percent reduction on all items.

Q So, you applied that 30 percent reduction across-the-board both to common items and noncommon items, as you have used that term in the preparation of CX-200, is that right?

A Across-the-board on all items.

Q In addition to that across-the-board discount, does the Borden work sheet, CX-288 R & S in particular, indicate that Borden paid other rebates to Wallies in this period of time in connection with special items only?

A During the months of June through September, Bordens allowed Wallies certain cents-off on specific items. During the months of October and November, there were no special cents-off items.

Q Did you include in your calculation of net price for Wallies these special cents-off items as they appear on CX-200?

A They were so included.

Q In other words, all the specials on CX-288 R & S are items that are common items, is that correct?

A No.

Q They were not?

Which ones do not show up in the calculation of CX-200?

A As far as the month of June 1969 is concerned, Yogurt did not show up as a common item.

Q What was the rebate given to Wallies according to the Borden worksheet for yogurt?

A A total of $7.79.

Q For themonth of July ---

A I might mention here in regard to the half-and-half, where it is shown 354 units at .089 cents deduction, that was spread over two different weeks. The week of June 7, Wallies purchased 270 units; the week of June 14, they purchased 84 units.

Q Without going into how you spread it out, you did apply the $31 to reduce the Borden net price to Wallies on that particular item, is that right?

A Yes, sir.

Q For July, are there any specials paid by Borden to Wallies that do not enter into your calculations because they are not common items?

A Yogurt here would also be one of the items which was not a common item.

Q Are there any items for August that do not enter into your calculations?

JUDGE HINKES: Mr. Foley, we are running past our usual lunch recess. I was wondering whether this would be a convenient point to break.

MR. FOLEY: I will finish with this Exhibit which is right in front of us right now in about two minutes, Your Honor.

JUDGE HINKES: Very well.

THE WITNESS: For the month of August 1969, the two items, which are fairly illegible here, but we have received clarification of them, are two items which did not fall within the common item category, and in September 1969, we did not use the item where there was a cents-off allowed.

MR. FOLEY: Once again I take it that the difference between the Borden net sales of all items, as that term appears on CX-200-B and the sales figures for the relevant period appearing on CX-288, is due to the fact that you subtract the rebate from the invoice price, is that correct, sir?

w4

the form of check registers to further substantiate the total amount of the rebate for each one of the months.

Q Would you turn to your data on the rebate check registers applicable to June 1969? Do you have that, Mr. Bitting?

A I will get it. It is in back of me.

Q Would you get your check rebate registers for Wilco?

A Yes, sir.

Q Now, the check register applicable to the June sales by Borden to Wilco is dated July 28, 1969, is that correct?

A That is correct.

Q The amount of the rebate paid by Borden to Wilco is $725.14, is that correct?

A That is correct.

Q Now, for June 1969 did you apply an across-the-board discount to all purchases by Wilco of 8.1 per cent?

The figure of $725.14 that appears on the check register, is that the same figure that appears on the Borden worksheet, Exhibit 288-T for the month of June?

A Yes, sir.

Q Does that rebate of $725.14 include a promotional allowance of $83.33 paid by Borden to Wilco?

A Yes, sir.

Q Do you know what that promotional allowance was for?

A We made a number of endeavors to define that through various sources, including the Borden officials as well as the Wilco Food Center, and we were not able to determine what the promotional allowance of $83.33 was applicable to other than the fact it appears on the rebate schedule, rebate worksheets for the milk and dairy products.

Q Therefore, when you were unable to determine what item or items to which you should allocate the promotional allowance, you allocated it proportionately to all items, is that correct?

A That is correct.

Q Does the same situation apply, that is the situation which references to the promotional allowance and your allocation to the promotional allowance, apply to the months of July, August, September, October, November, and December of 1966?

A It applies to 1969.

Q I am sorry, 1969.

A Yes, sir.

Q It does?

A Yes, sir.

Q Now, the rebate check registers that you have from Borden Company in front of you, for each of the months of June through March 1970, or through February 1970, I believe this runs -- am I correct, it only runs from June to February, 1970?

A Yes, it would vary from month to month depending on the quantities purchased of certain items.

Q Now at the beginning of your testimony, Mr. Bitting, you described earlier versions of CX 188 and the other exhibits. Were these earlier versions in all cases identical to the present versions that you have offered with the exception of the definition of common items?

A Yes.

Q So that the difference between your present exhibits on the Indiana customers of Borden and the earlier receipt of exhibits is exclusively the consequence of a redefinition of common items, is that correct?

A That is correct.

Q So that the record will be perfectly clear, will you explain what that redefinition of common items was?

A Originally, the definition would include those items which were purchased by the non-A & P stores on a week to week basis and also purchased by the A & P store, including those items where the items purchased by the A & P store were private label as well as a Borden label items. The revised CX 188 and following price comparison tabulations deleted those items where there was a Borden label product used and they now reflect only the private label products which were considered as purchased by the A & P stores.

Q In comparing your present set of exhibits, CX 188,

23

et cetura, with those which you previously prepated, I find that the percentage of discrimination shown on your present exhibits in evidence is in every case greater than that on the earlier exhibits, is that correct?

MR. MATHIAS: Your honor, I am going to object. There is no other exhibit in evidence in this matter. I believe the witness should be confined to questioning about exhibits in evidence or underlying documentation, not documents which are not exhibits in this matter or do not form any underlying basis for the exhibits offered.

MR. FOLEY: Your honor, I think they were marked for identification by complaint counsel and testified to by the witness. In any event this is cross-examination and certainly I am entitled to pursue it, so to speak, if you wish to call the earlier exhibits draft exhibits prepared by Mr. Bitting and compare those exhibits with the present version. I am entitled to explore what he did in putting the exhibits together. And if there are differences between one version and another version I certainly am entitled to bring that out.

MR. MATHIAS: Your honor, we have an earlier offer of exhibits which proved to be mathematically incorrect and they have been withdrawn. A corrected version was then offered. The witness certainly could not be cross-examined as to a non-existent document in effect a document which is not in existence so far as this case is concerned. I see no difference here.

Furthermore, I would like to point out that on Voir Dire, Mr. Foley was allowed to make this comparison and I did not object at that time and I believe it is burdening the reporter to go back into it now, especially considering there are exhibits not in the record and which have not in effect been offered in evidence.

MR. FOLEY: Your honor, this question is not retreading any ground I covered on Voir Dire. You recognize I am checking off questions page by page. I did not ask this question or series of questions during Voir Dire because of the objection of the nature now advanced. In any event, it is very very clear that Mr. Bitting, even on examination of this exhibit by complaint counsel, has testified that the terminology and preparation and mechanisms used here are similar to those which were used in initially in preparing 188, et cetura. I think I am entitled to show what the result of the change is, said to be essential changes redefining the term "common items". I think I am entitled to show what that change is.

JUDGE HINKES: There has been some testimony with respect to the original documents. I don't think I can deny you the right to ask questions comparing the two documents. The only thing I would caution you on would be to avoid repeating matters that have been covered on Voir Dire. That is something you should attempt anyway.

MR. FOLEY: Yes, your honor, I certainly will. I have no intention of repeating matters that were covered on Voir Dire insofar as it is humanly possible.

BY MR. FOLEY:

Q Do you have the question?

A I have the question. I did not make a company-by company analysis. That would take a few minutes. I will be happy to do it. Generally, the discrimination did increase on the revised -- on the tabulations now known as CX 188 and the following price comparison tabulations.

Q When you say the discrimination increased, I take it you mean the percentage of discrimination increased because in fact the dollar amount of discrimination decreased. Is that not true? There are two questions. When you just said the discrimination increased, you meant to say the percentage of discrimination?

A The percentage of discrimination, yes. But I am not sure if that is the case in every one of the nine companies.

Q Why don't you take a look at 187, your present CX 187, which is the review exhibit, of all the percentage discriminations and dollar discriminations and your old CX 187. Do you have the new 187 and the old 187 in front of you now?

A Yes.

Q For Burger's market for the period, October 1966 through March 1967, for the first period, did the discrimination increase from 12 percent on the old exhibit to 14 percent on the present version?

A Yes, it did.

Q Did the discrimination in this first comparison period for ~~modeling~~ Model increase from 16 to 22.5 percent?

A Yes.

Q Did the average discrimination, what you call the total percentage discrimination, for the Title stores in this first period from 13.2 to 15 percent?

A Yes.

Q Did that for Wallies Market go from 13.8 to 17.5 percent?

A Yes.

Q Did that for Wilco Food Center go from 12.5 to 14.5 percent?

A Yes.

Q Now, with reference to the second period, that is the period June 1969 to March 1970, did the discrimination for Burger's go from 15.2 to 15.7 percent?

A Yes.

Q Did that for Model go from 15.2 to 16.3 percent?

A Yes.

Q Did the total for all the Title stores go from 5.7 to 6.3 percent?

A That is correct.

Q In the case of Wallies, apparently it came down in the second comparison period, you are right.

A That is the one I had --

Q I am sorry. On the original exhibit, if you will look at Wallies, you have 17.7 on the original CX 187 which I believe was a transcription error. Originally, it was 17.4 percent on Wallies. Could you check that?

A I have 17.7.

Q On 187?

A On 187.

Q Do you have the old copy of Wallies exhibit, the old 200? You will see it is 17.4 rather than 17.7.

A This one I am looking at is the one which we originally submitted to you on June 1972.

MR. MATHIAS: Your honor, I would like the record made clear that when they are talking about the old CX 187 that the references are not to Commission Exhibit 187 in this matter. I am afraid that the record is going to get a little bit confused as to whether or not there are two exhibits.

MR. FOLEY: There are not. I used the word "old" because I recognized they are being replaced.

JUDGE HINKES: There is only one 187. The other one has never been marked for identification.

MR. FOLEY: You are right. It is only the other exhibits, 188 and on that have been marked.

MR. MATHIAS: I might suggest that he use some language such as original computation or something of this sort rather than referring to 187 because there is no such document.

JUDGE HINKES: Thus far we have comparison of Commission Exhibit 187 which has been received in evidence, that comparison being made with certain computations made earlier by Mr Bitting on the same subject matter. The references to the old or previous Commission Exhibit 187 are only references to Mr. Bitting's earlier computations and not to any earlier exhibit.

MR. FOLEY: That is correct.

BY MR. FOLEY:

Q On your earlier computations, to finish out the last one, on Wilco --

MR. MATHIAS: Your honor, before he gets to that I believe the record ought to be made clear that the witness was asked a question about his earlier computation on CX 187 in connection with Wallies. The witness has answered that his earlier computation showed a 17.7 percent and CX 187 shows 17.6 percent. I think that should be clear on the record.

JUDGE HINKES: Yes.

BY MR. FOLEY:

Q Is that correct, Mr. Bitting?

A That is correct.

Q The percentage of discrimination as you show it on your earlier copy, your draft copy, of CX 187 as it is now presented was 17.7. Now the figure has gone 17.6 percent.

A That is correct.

Q Finally, with reference to the Wilco Food Center, the percentage of discrimination from the old copy has gone from 5.1 percent to 6.6 percent on your present CX 187.

A That is correct.

Q Now the old copy, the old CX 187 --

A No --

Q What I have referred to, as I pointed out, it was not marked for identification as CX 187 in this court room. It was marked as CX 187 in the copies that were presented to us. There is such a marking on the document as CX 187, is that correct?

A Yes.

MR. MATHIAS: Excuse me, your honor, I don't want to interrupt but I wish Mr. Foley would refer to it as the original computation or something else besides old 187 or any reference to 187 at all. I am afraid that this record is going to get muddled and confused.

MR. FOLEY: I will try.

BY MR. FILEY:

Q The original record of present 187 was a summation, was it not? of the former Exhibit 188, 180, 191, 193, 194 through 198, 200 and 202?

A Yes.

MR. MATHIAS: Your honor, again, I would like to note

for the record that when Mr. Foley speaks of former exhibit, he is speaking of former drafts of these exhibits and the present exhibits and the former documents he referred to were not identified or offered in evidence in this record.

MR. FOLEY: I am sorry, they have been identified. They were all marked.

JUDGE HINKES: They were marked for identification.

MR. MATHIAS: And withdrawn.

JUDGE HINKES: They were not offered or received.

BY MR. FOLEY:

Q Mr. Bitting, with the exception of the Wallies Market, can you explain the increase in percentage discrimination between your present comparison and your earlier comparison?

A The original computation included certain items which were deleted when the present CX 187 was compiled. The deletion of those items resulted in changes in the various columns such as total net billing to the non-A & P store, the billing if the non-A & P store had been charged A & P prices, dollar discrimination and percentage of discrimination as a result of these changes in the present CX 187 represents the information as a percentage now on my earliest worksheet.

Q Did the changes then result from the elimination from your comparisons of those items purchased by Bordens Indiana competitors and which were purchased by A & P under only the Borden label, is that correct?

MR. MATHIAS: Your honor, I wonder if we can have a few minutes break. We have been going over an hour. I believe this would be a good time for a break.

JUDGE HINKES: Yes. Let us take a short recess at this point.

(Short recess)

JUDGE HINKES: The hearing will be in order. You may proceed, Mr. Foley.

BY MR. FOLEY:

Q Mr. Bitting, the decrease in the percent discrimination suffered by non-A & P customers in Indiana as the comparison is extended beyond purchases by those stores which were both by A & P under private label indicates, does it not, that the discrimination was less on items not included within the Borden A & P private label arrangement and accordingly not included in your comparisons?

A May I have the question reread? You put the word "stores" in there. I think you meant products.

Q JUDGE HINKES: Perhaps you may want to rephrase that and break that long question up into several segments.

MR. FOLEY: Yes, your honor, I will do that.

BY MR. FOLEY:

Q We have agreed, I believe, Mr. Bitting, that with the exception of Wallias Market there is a decrease in the percent discrimination suffered by the non-A & P customers in Indiana as the comparison is extended beyond the items reflected on CX 188, et cetura. Is that not true?

JUDGE HINKES: You mean extended insofar as it includes items which were excluded from those exhibits?

MR. FOLEY: Yes, I do.

THE WITNESS; The question was the percentage.

JUDGE HINKES: Would you say the percentage of discrimination went down as you added the items excluded from your exhibit?

THE WITNESS: Yes, they did.

MR. MATHIAS: That was the percentage of discrimination.

JUDGE HINKES: Yes, the percentage.

BY MR. FOLEY:

Q Mr. Bitting, there are no items that are packaged in glass containers included in your comparison CX 188, et cetura, are there?

A That is correct.

Q Now, your comparisons involve Burger's Market, Model Food Center, Joseph Title and Sons, Wallies Market and Wilco Food Center. Did you prepare studies similar to those that you have offered in this hearing for these stores for any other Borden customers in Indiana?

A Yes.

Q For whom?

A Southtown and Dick's Market for certain periods.

mentioned in Exhibit 29-A.

MR. MATHIAS: YOur Honor, I object to that strenuously. The witness has not made any such statement. The witness is not aware of the information that is contained therein. I think if CX-288 is compared to some of those, you will find they are very similar figures.

MR. FOLEY: I withdraw the question.

By Mr. Foley:

Q Mr. Bitting, you did look at Respondent A & P Exhibit 29-A through D when it was given to you by Mr. Soeffing, did you not?

A Yes, sir.

Q And, Mr. Bitting, have you included any of the figures and data shown on any of those pages in Respondent A & P Exhibit 29 in your preparation of the tabulations for Tittle? First, we have to establish whether he did or not. That was Mr. Mathias's last objection.

MR. MATHIAS: Your Honor, my objection is to any further questions on a document not in evidence and not authenticated. I believe he can establish the point he is trying to make by asking the witness if he has included any payments other than those he has already stated were included in the record.

As a matter of fact, I believe that has already been done in a series of questions in which he has asked Mr. Bitting concerning whether or not he subtracted anything from the Tittle Store billings except the 4-4-2 price on gallon and half-gallon units in the first period and the two percent in the second period, to the four stores to which this applied.

I think we have had several questions along those lines and Mr. Bitting has answered them and that should take care of them.

MR. FOLEY: Suppose Mr. Bitting would say "Yes, I did look at this and I did go over it and I have taken many of those figures and I have included many of them in this Exhibit and many of the figures I have here on these Exhibits are the same as the ones I used," would Your Honor still maintain this Exhibit is not admissible if he used it?

JUDGE HINKES: We are not at that point yet.

MR. FOLEY: That is correct. That is the purpose of my question here, whether he read it over and used it.

JUDGE HINKES: The point before us is if Mr. Bitting did say that he looked at this document, can he be asked whether he used the document?

MR. MATHIAS: That question I would not object to.

JUDGE HINKES: I think that is the tenure of the question, at any rate, whether any of the figures in that document were used by him in his computations.

MR. MATHIAS: I would object to the question, whether any figures in it. I would state the proper question is whether or not he used that document in the preparation of the Exhibit. Some of the figures therein might correspond with the figures he used.

As a matter of fact, I believe that this is the case. But that does not mean that the witness has used this document in any way in the preparation of his Exhibit.

JUDGE HINKES: I am concerned with the document as such and not by the coincidental use of figures.

MR. FOLEY: You see, we have this ambiguity which has arisen before with the meaning of the word "used." I prefer, therefore, because of its ambiguity, not to use that word in my questioning because I am afraid that the answer that I get would not be information I have.

It would not lead us anywhere. That is the reason I am interested in, Your Honor, whether any of the figures contained on Respondent's Exhibit 29-A through D appear in Mr. Bitting's calculations.

JUDGE HINKES: I shall sustain the objection to that question most definitely. The question now is whether he used this document and not whether he happed to use figures which happened to appear in some document somewhere.

By Mr. Foley:

Q Mr. Bitting, did you use this document in the preparation of your calculations of the [illegible]ittle comparisons?

A No, sir.

***

In connection therewith, we caused Mr. Bitting to prepare these two Exhibits which when taken in connection with the data in CX-183 would show, and the price lists that are available for these periods of time in the record, that A & P was receiving a much lower discount on its purchases of the private-label product than was available publically in the market from the Borden Company.

JUDGE HINKES: That is 183 which shows that they received a higher discount rate.

MR. MATHIAS: Excuse me. I mean a much higher discount rate.

JUDGE HINKES: I can understand the relevance of that document but I don't understand the relevance of 180.

MR. MATHIAS: Your Honor, this merely shows it for another period of time. Why I selected another period of time was that, as another portion of our evidence shows, the amount of the price discrimination in this matter increased in the spring of 1966 due to the failure of A & P to accept certain cost increases which had been incurred by the Borden Company.

Therefore, this is being shown as a comparison to show the fact that the gap between A & P and the market increased as a result of this later negotiation and later refusal of A & P to accept certain cost increases incurred by Borden.

JUDGE HINKES: Of course, we don't know whether or not the discount also increased for the non-A & P customers or that the discrepancy was perhaps not any greater.

MR. MATHIAS: Your Honor, we do have in evidence the published discount and list prices of the Borden Company. That is the other half of that area of proof.

MR. SCHAEFER: The problem there, Your Honor, is that I think the total evidence in this case -- it shows that for this period of time, there is no evidence as to what any other Borden customer was actually paying. In fact, the evidence that is available for the period selected by Complaint Counsel shows very few, if any, of the other Borden customers were paying either the Borden list price or, in the category that they were billed, on the Borden published discounts.

Absent, some linkup and some proof as to what other Borden customers were paying in August 1966, this document stands without anything to comepare it to.

JUDGE HINKES: I am not going to make my ruling at this time on the admissibility of the document in any event. I simply wanted to hear from Complaint Counsel before he went any further as to his point of view with respect to relevancy, and the argument will be entertained later.

I think it is sufficient for our purposes at this time to simply understand what the purpose of bringing these records in is alleged to be.

MR. FOLEY: That was the thrust of my question, to try to elicit this as best I could from the witness. Obviously, Q In preparing these exhibits 184, 189, 192, 201 and 203, I take it that you had occasion and did in fact examine and analyze the underlying documents, that is, the tax reports and profit and losses statement of the particular customer; is that correct?

A Yes, sir.

Q On the basis of that examination, can you tell us approximately what percentage of the net sales that you show or display on CX 184-A for Mayfair Foods constituted gross sales, sir?

A I can not.

Q Can you tell us what percentage of the net sales which you show on Exhibit 184-A for Jim's Grocery's constitute sales of grocery products?

MR. FOLEY: May we go off the record.

JUDGE HINKES: Yes, off the record.

(Brief discussion off the record.)

JUDGE HINKES: On the record.

MR. FOLEY: Off the record we agreed I would ask a series of questions on this subject but it was agreed I would withdraw such question now and return to it at a later opportunity when the witness had an opportunity to prepare himself.

By Mr. Folwy:

Q Mr. Bitting, I would direct your attention to 183-A,B,C and D; do you have that exhibit in front of you, sir?

A Yes, sir.

Q Directing your attention to 183-A, the title of the Document being "Value of Sales and discounts to Borden Retail Store Customers of O'Hare Branch in Chicago Metropolitan area purchasing more than $800 of Milk Products During February, 1966."

Are all of the customers listed on 183-A and 183-B customers on the O'Hare Branch of the Borden Company in the Chicago Metropolitan area who purchased more than $800 worth of milk products?

A They are.

Q What was the basis for the selection of cut-off of $800 of milk products?

A Complaint counsel instructed me to use that as a cut-off.

Q Was that $800 per month in February 1966 or per week?

A During the entire month of February, 1966.

Q Milk products--what is included within the $800 of milk products as you used this term on Exhibit 183-A and B?

A The products as shown in the product books of the Borden delivery man which would include such items as the various types of homogenized milk, the chocolate milk, the skim milk, also the products such as yogurt and cottage cheese.

Q Does it in fact include everything that was entered into the route book by the Borden driver salesman for that particular customer?

A It does include everything.

Q Some of the products delivered to the customers were such things as orange drinks; were they not?

A I don't recall on these particular customers whether there were any such items. There may have been.

Q There were no ice cream products included within the route book pages for these particular customers, were there, Mr. Bitting?

A No, sir.

Q Were there any items entered in the route book pages as prepared by Borden driver salesmen of items which in your judgment are not milk products?

A There were none so far as I recall.

Q In preparing this exhibit, Mr. Bitting, I take it that you examined the route books of the Borden Company for all of the stores on what is known as the O'Hare route; is that correct?

A Yes, sir.

Q On Exhibit 183-A and B, and also on C and D, or I will withdraw C and D, but you have listed every store that purchased more than $800 in milk products form the Borden Company; is that correct?

A Every store that I could determine purchased more than $800.

***

Q In examining the Borden route books and in determining the dollar amount of sales to the Borden non-A&P customers, did you determine whether the prices charged to those non-A&P customers listed on your Exhibit 183-B, C and D -- did you determine whether the prices charged to those customers corresponded with Borden's list prices?

A I made a check of several different days, taking the price book information for the particular products times the Borden price list price and determined that they were in some cases, they came out to the exact amount shown in the price book. In other cases, there was a discrepancy.

Q In this case, two of the customers listed on this Exhibit 183-A through D have testified, I believe Mr. ~~Lassono~~ Lasorso of Mayfair and Mr. Cox of Centrella -- do you recall hearing their testimony?

A Yes, I do.

Q Do you recall their testifying they received specials each week from the Borden Company?

A I don't recall that part of their testimony.

Q Do you recall whether Mayfair Foods and Centrella, from your analysis of the route books, were receiving special pricing on certain items?.

A From the analysis of the price book, that information would not be shown.

Q My question is: Did you determine by comparing the price charged to Centralla for an item against the Borden published price list that Centrella was receiving a price in the price book, in the route book different from the published price?

A I did not make that determination.

Q You testified that on some occasions the prices charged to the Borden customer were identical with the Borden published price list and that on other occasions there was a departure, is that correct, Mr. Bitting?

A That is correct.

Q However, regardless of whether the price was at list price or at some price other than list price, you have simply added all the prices up and included them under dollar amount of sales, is that correct?

A Dollar amount of sales figure represents the accumulation of the daily charges as noted in the route book by the driver.

Q What do the figures under the column entitled "Discount Rate" represent?

A That is the relationship of the amount of the rebate divided by the amount of dollar sales.

Q The figures in the column in the column entitled discount rate do not purport, therefore, to be a discount received by the customer from Borden's list price, is that correct?

A They are the discount rates which the comparison of the rebate paid by Borden to the total dollar sales figure I have arrived at.

Q But I can't by looking at your column discount rates say that Forest Food Mart, for example, received a discount from the Borden published price list 018.4 percent, can I?

A You can't from the prices on the price list.

Q That is correct. Yet, for the A&P Company shown on the bottom of 183-B, the discount rate you show for A&P is 36.6 ~~32.6~~ percent.

A Yes, sir.

Q Is that 36.6 ~~32.6~~ percent a discount from the Borden published discount prices?

A Yes, it is.

JUDGE HINKES: Does this figure of 36 percent on A&P's figures discounts from Borden's price list, is that correct?

THE WITNESS: That is what the discount amounted to. The price list does not show this. We do not have a price list for A&P.

JUDGE HINKES: I understand. Taking Borden's price list as it is published and comparing that to A&P's prices, you find there is a 36 percent difference?

THE WITNESS: Yes, sir.

JUDGE HINKES: With respect to other customers, the one just mentioned, I think, having an 18 percent discount. How did you arrive at that 18 percent?

THE WITNESS: I first arrived at the total dollar amount of sales and then I related the rebate memoranda amount in dollars to that total amount and it came out to 18 percent, or whatever the case may be.

JUDGE HINKES: That is not necessarily then 18 percent discount from a price list, is it? It is an 18 percent discount of price charged, is that correct?

THE WITNESS: Yes, sir.

JUDGE HINKES: In any event, the net price charged to that customer, a non-A&P customer, was 18 percent below the gross price charged to him whether by price list or in any fashion?

THE WITNESS: Yes, sir.

JUDGE HINKES: The 36 percent price discount shown for A&P results in a net price which is 36 percent below Borden's price list?

THE WITNESS: Yes, sir.

JUDGE HINKES: How can we determine the connection, if any, between the non-A&P customer's price charged and Borden's price list? Is there any connection between the two?

THE WITNESS: The dollar amount of sales written in the route book by the deliveryman is based upon the Borden price list, according to Mr. Rouse's testimony.

MR. SCHAEFFER: I object to that characterization of Mr. Rouse's testiomony.

cases, the books are illegible or the figures in the books are illegible. I had to use a certain amount of guesswork in order to try to decipher a particular numeral.

These books are used for a whole month and they are dog-eared and so forth. In some cases, I attributed the fact that I could not arrive at the exact figure for my calculations of the ~~can't~~ quantity times the individual product price -- that figure did not jibe with the routeman's computation because of the illegibility of some of the figures.

JUDGE HINKES: Were there instances, however, where the figures were quite clear and you nevertheless found the discrepancy between the driver's figures and the figures thatyou would arrive at by computing the quantities against Borden's published price list?

THE WITNESS: There were such instances.

JUDGE HINKES: How does that affect your answer that it is your understanding that the driver's book reflect Borden's published lists?

THE WITNESS: I believe Mr. Rouse's testimony is to the effect that the driver used the Borden list price in his computation of the amount that he charged for the various products in order to arrive at a daily total sales figure.

JUDGE HINKES: That is what you are basing your answer upon?

THE WITNESS: Yes, sir.

JUDGE HINKES: I think this might be an appropriate time to recess.

Can we resume at 1:30?

MR. MATHIAS: That is fine with us.

MR. FOLEY: That is fine with us, Your Honor.

JUDGE HINKES: We will reconvene at 1:30 in this room.

(Whereupon, at 12:15 p.m., the hearing was recessed to reconvene at 1:30 p.m., the same day.)

AFTERNOON SESSION

1:30 p.m.

R. JOHN BITTING resumed the stand and testified further as follows:

CROSS-EXAMINATION (resumed)

By Mr. Foley:

Q In determining the dollar amount of sales, Mr. Bitting, charged in the months of February and March 1966 to the Borden customers listed on A through D of Exhibit ~~186~~ 183, did you check the Borden invoices to those particular customers?

A I did not.

Q Did you have the Borden invoices available to you?

A I did not.

Q Did you attempt to get them?

A I did not.

Q In preparing your comparisons for the Bordon customers in the State of Indiana, you did check the invoices, did you not sir, Exhibit 188A or Exhibit 188 against the Burger Company to obtain the prices that Burger paid you utilized the Borden invoices to the Burger Company, did you not?

A Yes, that is the basic document.

Q Why did you not attempt to use the invoices to the particular customers on the O'Hare route in preparing Exhibit 183?

A They were not available to me, and I relied strictly upon the dollar sales figures as shown in the price books.

Q I thought you told me you did not try to obtain the invoices to customers on the O'Hare route?

A I did ont try to cbtain. They were not given to me to work up this exhibit.

Q Did you ask Commission counsel to try to get them?

A I did not.

Q Is it not a fact if you had the invoices you would be able to determine the actual per unit price charged to the customer for each item?

A If the invoices were in the same form as the invoices we used in the price comparison tabulations, yes, I would be able to have that information.

Q Then you would have been able to determine precisely at what discount off the Borden list price these particular customers listed on 183 were billed, would you not?

A Yes.

Q Mr. Bitting, do you have in the courtroom with you today the rebate check registers to the customers who appear on CX-183?

A Yes.

Q Could you get them, please?

Directing your attention to the invoices in front of you, to the column headed "invoice amount" in each case for the stores on the O'Hare route, does there not appear a dollar and cents figure followed by a plus sign?

[***].

examine route book pages for the customers for whom you have no rebate memoranda on Exhibit 183. Once again, they are Misicka's Foods, Floom Brothers, Greenview Fruit and Madison-Laveigne Food Mart for the months of February and March, 1966 and determine for yourself whether there is not a statement on the route book pages for each of those customers; that there is a statement similar to the one that I have called to your attention with reference to Misicka, such as consolidated and cooperative, some such indication.

Referring to Floom Brothers for February of 1966, the route book page, is there an indication somewhat similar to that for Misicka's on that route book page?

A There is no such indication on that page or a similar page.

Q Is there not an indication on the one for Floom Brothers "central billing?"

A There is an indication for central billing.

Q With reference to Greenview Fruit for February, 1966, would you turn to that page on the route book?

A Yes. There is no indication as far as the same information as on route book 3 for February, 1966 for Misicka's Foods.

Q Is there a statement, central billing?

A There is a statement, central billing on the route book.

Q With reference to Madison-Laveigne?

A There is a statement in the upper right-hand corner,

[***

1276

A Yes.

MR. MATHIAS: Your Honor, it might simplify things if complaint counsel made brief reference to Mr. Rouse's testimony wherein he testified he returned all price lists with respect to the Borden Company except a few down around the LaSalle area which he could not locate. We are belaboring a point that is already established through Mr. Rouse, or is it not?

MR. FOLEY: I just wanted to speak to Mr. Schaefer. I did not want to belabor that point.

JUDGE HINKES: That is all right. Go ahead.

MR. FOLEY: I believe it has been established, Your Honor, that that was the Borden price so far as we are available to determine.

JUDGE HINKES: Very well.

By Mr. Foley:

Q I take it when you said you compared the dollar amount of sales received by the non-A&P customers on Exhibit 183 and subparts against the Borden list prices in order to determine whether the route books billed them at list price or some other price that the list price against which you were making the comparisons were these same Exhibits 137 and 139?

A That is correct.

Q Do you know whether all of the stores that you have listed on Exhibit 183 and subparts as being in the O'Hare branch also fall withing the same area designated by the Borden Company as Chicago and suburbs?

A In my opinion, they do fall within the same area.

Q On what do you predicate that opinion, Mr. Bitting?

A I did make a check of each one of these companies and determined that they were, as far as the location was concerned, all within my definition of the Chicago metropolitan area.

Q That is not my question.

My question is whether they were in the Borden designation Chicago and suburbs? As you know, the Borden company had different prices to customers in the Chicago metropolitan area.

A In ~~any~~ my opinion, the Chicago and suburbs area would include Chicago and all the close-in towns in the suburbs of Illinois. These addresses fell within that area.

Q Turning once again to 183B and D, I am directing your attention to the item "total purchases", what is included again within total purchases?

A The A&P purchases of eleven private-label products; namely homogenized gallon, one-half gallon and quart containers, two percent one-half gallon, smik quart as well as the one-half gallon of skim, the buttermilk ~~and~~ in the quarts and the one-half gallon; chocolate in the quarts; the whipping cream in the one-half-pint size and the eleventh one is the half and half in the pint size.

Q This is not total purchases from the Borden company but purchases of the private label items.

***

Q In any connection at all.

A There are several exhibits, other exhibits than CX183 which contian information on a more restricted scale than CX183 as far as certain purchases in the Chicago and suburbs area is concerned.

Q Perhaps you misunderstood my question.

Did you find any calcualtions of the Borden Lable purchases by A&P and the discount rates received by A&P on those Borden purchases?

A There was another exhibit where I made calculations as far as the Borden lable purchases of a particular product was concerned, but not so far as any discounts were concerned.

Q What is the exhibit that you made calculations for Borden lable purchases?

A CX185 is one exhibit. But it does not show any discount picture.

Q CX185, if I recollect your earlier testimony correctly, the total purchases for the week indicated by A&P from Borden of the items covered by the private lable agreement under both the Borden and the private-lable lables; is that correct?

A That is correct.

Q But even 185 does not list all of the purchases by A&P for any given week, does it? Do you have 185 in front of you?

A Exhibit 185 does list value of the private lable and Borden-lable purchases for weeks over a three-year period.

Q But only the items covered by the private lable arrangement.

A Yes, sir.

Q For example, on November 20, 1965, A&P pruchased 169,047 under the private lable program, and purchased 183,659 points of those identical items under the Borden lable program.

A That is correct.

Q This information comes from the Borden Company weekly billings of A&P store summaries for Chicago and suburbs; is that correct?

A That is correct.

Q The total points purchased by the A&P Company from the Borden Company was in excess of 352,706 points; is that correct?

A That is correct.

Q Do you know what th total purchase was in points?

A I do not know what the total purchase was.

Q In Exhibit 185 to which you just made reference, did you made any calculation of the Borden purchased lables from A&P in the Chicago and suburbs stores?

A Total purchases?

Q Total purchases or Borden lable purchases.

A No.

Q Therefore, you made no calculations of the discount rates

A You are referring to CX 185?

Q No, I am referring to the stores' documents you used to prepare CX185 and 183, namely, the Borden summary billing called Chicago and suburbs.

JUDGE HINKES: During those two months, were the Borden-lable purchases in dollars larger than the private-lable purchases in dollars?

MR. MATHIAS: I would like to know from the witness whether he has to make calculations.

JUDGE HINKES: Can you tell us just by a fast look at the document, Mr. Bitting, or do you have to make a calculation?

THE WITNESS: If I understand your question correctly, Mr. Foley, the Borden-lable dollar value was greater than the private-lable dollar value during the month of February 1966.

By Mr. Foley:

Q That is correct. That was my question.

Is the same true for March 1966?

A The same is true for March of 1966.

Q Thank you, Mr. Bitting.

To summarize this, Mr. Bitting, I believe you have stated that Exhibit 183 shows only the rates of discount received by some of the non-A&P customers who purchased in excess of $800 in the month in the Chicago metropolitan area on the O'Hare branch; is that correct?

A Yes, sir.

Q This discount for the non-A&P customers is based on all of their purchases form the Borden Company; is that correct?

A That is correct.

Q This is compared ton CX-183 to the discount received by those A&P stores in the Borden billing area identified as, "Chicago and suburbs" on their private lable purchases only; is that correct?

A That is correct.

Q Is there any attempt to correlate the discounts of the non-A&P stores against the average unit purchased per delivery by those stores, the average number of units purchased for delivery by those stores?

A No, sir.

Q And there is no adjustment made, am I correct, for optional services recevied by the non-A&P stores?

A That is correct.

Q Once again, I am not sure I understood this this morning. How do you know that all of the non-A&P stores listed on exhibit 183 are in the same billing area as the A&P stores against which they are compared. I am not asking you if they are in competition, but whether they are in the same Borden Billing area.

A They are in all the stores listed on 183 A through D are on the O'Hare branch of the Borden Company in the Chicago metropolitan area.

Q You have reviewed, have you not, in the course of your preparation for this case, the Borden bids to the A&P Company? Have you seen the basic bid documents that are in controversy in this case?

A I don't believe I have.

Q Have you ever seen in the course of your analysis of these records and documents that the Borden Company had anywhere from five to nine separate billing areas under which they billed A&P stores?

A I am not familiar with that.

Q Do you know that the Borden Company billed A&P at different prices in different regions?

A I am not familiar with that.

Q I ask you to assume that that is so, that they had several different biding areas and I believe the documents and the record will support that.

For purposes of this comparison, therefore, I am submitting to you that you would have to know at least that the A&P stores in Chicago and suburbs, which is a Borden billing area, which is one of the several billing areas, I am suggesting to you, yo would have to know those stores are in the same area as all the stores you listed here as being in the O'Hare branch because if they were in a different billing area, you would have difficulty comparing prices.

MR. MATHIAS: I have not been able to follow that question and I would like to have it read back to determine whether I should object.

(The pending question was read by the reporter.)

MR. MATHIAS: I object, first of all it is not a question but a statement of Respondent counsel's position. There is nothing about O'Hare in this witness' testimony. I think the witness has testified what his understanding of the Chicago and suburbs area is and he has made a study of the locations included on here and they were all in the Chicago or close-in suburbs area and, therefore, it was his assumption they were covered in the Chicago and suburbs billing. This has clearly been testified to and I believe this is improper to try to argue with the witness on this position.

MR. FOLEY: I think Mr. Mathias object before I got the opportunity to phrase the particular question. The question would be: Does Mr. Bitting agree with my analysis of what we have been talking about. I think that is the first thing. Perhaps he does or does not. Perhaps he has some variant of it himself.

JUDGE HINKES: I am not sure the witness can answer that particular question. Your are stating a proposition to the witness that a proper comparison would have to envolve a determination of the specific regional prices. I think that this witness' testimony is apparent to the effect he compares those non-A&P costs with the actual private-lable prices enjoyed by A&P. I don't know that regional differences are going to enter into it.

MR. FOLEY: I think perhaps I am not making myself perfectly clear to Your Honor either, because the purpose of the exhibits as I view it, if you look at the bottom of 183 * B and D, the witness determined the A&P cost if purchased at the A&P prices and he determines the discount rate for the A&P Company.

The witness also calculated discount rates for the non-A&P stores. If any of these non A&P stores in fact turn out to be in the Elgin billing area rather than the Chicago or suburbs billing area, then I submit we have a meanless comparison. I assume Complaint counsel and Mr. Bitting are aware of that and have taken that into account. I am trying to pursue how they took into account to be sure that that is correct and they did it correctly so that they have just Chicago and suburbs stores.

JUDGE HINKES: When you made your calculations arrivir at the price A&P would have paid had they bought at the non-A&P prices, did you take into account the non-A&P prices effective for that particular A&P store?

THE WITNESS: I did. I sused the price lists for the non-A&P customers.

JUDGE HINKES: You used the price list for the non-A&P customer, but did you know or fid you find out what non-A&P price the A&P store would have had to pay on the assumptio there are varying prices to non-A&P buyers in different areas?

THE WITNESS: The price list I used showing the prices to the non-A&P stores covered the Chicago metropolitan region of the Borden Company. I considered the O'Hare branch falling within that area which is approximately the same as the Chicago and suburbs area.

BY MR. FOLEY:

Q Mr. Bitting, directing your attention to 183-A, the entry for Mayfair Foods, dollar amount of sales, on this exhibit that you have presented, the amount is shown to be ~~$2,763.87~~ $2,736.87, and the discount rate is represented to be 29.9; is that correct?

A That is correct.

Q Did you prepare an earlier calculation for Mayfair Goods?

I refer you to your earlier edition of CX183 which has been withdrawn.

A Yes, sir. I did prepare an earlier edition.

Q In that earlier edition of CX183, did you indicated that the dollar amount of sales of Mayfair Foods awas $2,729.17 and the discount rate was 30 percent?

A Yes, sir.

Q Did you explain the reason for the change?

A This earlier document was filed, according to my notes here, on October 15, 1971, two years ago. The present CX183-A through D was compiled last spring, approximately six months ago. during that year and a half time, I did some further work on the original exhibit CX183 and came up with a different figure, in this case by only few dollars, an $8 difference.

Q And you came up with a difference in the discount rate as a result of 1/10 of one percent; is that correct?

A That is correct. The dollar amount of the rebait would not change.

Q But the discount fell from 30 percent to 29.9 percent in your present calculation.

A That is correct.

Q Did you also make an earlier calculation for Barney Trainor?

A Yes, sir. I did.

Q Was the discount that you obtained for Barney Trainor in February of 1966, 23 percent as opposed to 22.4 percent which you now reflect on Exhibit 183-A?

A That is correct.

Q For Joe Michalowski, did you make an earlier discount calculation.

A I did.

Q Was that earlier discount calculation 22 percent as opposed to 22.4 percent which you now present?

A That is correct.

Q For Bruno Nalepa, did you make an earlier calculation of 13 percent?

A Yes, sir.

Q For Theresa Crispino, did you make an earlier calculation of 21.0 percent?

A Yes, sir.

Q For Reliable Sales Company, did you make an earlier calculation of 15.0 percent?

A Yes, sir.

Q In fact, you have made several other recalculations of the discount rates for many of the other companies and for many of the other time periods; is that correct?

A That is correct.

Q What is the reason for all of those changes?

A During that year-and-a-half-period between the original document and the document submitted to you last spring, I did some further examination of the route books which led me to be believe that this present CX183-A to D was the proper method to present the information.

Q On Mayfair Foods, what was it that you had done previously that you believed to be inaccurate or in error and which you changed?

A I will have to get the appropriate route books.

Q Is it mainly just arithmetic changes or that you have included or excluded items or did you divice something wrong, or what?

A You will notice the figures are within--one is out $8 and one is out $20.

Q Yes, but sometimes the discount rate drops somewhat significantly. For instance, Mr. Central goes from 25 percent in your old calculations to 23.1 percent in your New calculation; is that correct?

A Yes.

Q Congress Food goes from 22.0 percent to 20.5percent; is that correct? That is in February of 1966.

A Yes, sir.

Q Most of them are small, I agree with you, Mr. Bitting, 1/10 or 2/10 of a percentage, but in a couple of cases they are larger.

Perhaps we could look at Mr. Central and perhaps you coul tell us is the change a matter of some incorrect arithmetic or did you ~~make~~ take out products? It looks like to me you took out $200 or $300 worth of purchases.

A As far as May fair is concerned there is only a differenc of $8 in total purchases, not a couple of hundred dollars.

JUDGE HINKES: I don't think these insignificant differences will have any effect on the outcome of the case.

MR. FOLEY: The difference is between 25 percent discount rate to 23.1 for Mr. Central.

JUDGE HINKES: And I thought you said there was several thousand dollars differences in sales.

By Mr. Foley:

Q You have indicated the dollar amount of sales to be $3,342; that correct?

A That is right.

JUDGE HINKES: What did you include in sales the latter time that you did not the first instance?

THE WITNESS: I would have to go back and check my work sheets which I would be happy to do. There were a few instances where, when the first document was preapred, the route number had been changed in two or three cases. Earlier it was changed three times. I may not have picked up on the original exhibit one of those four, five or a week's period of time and in going back I was able to tie in the three routes with this particular customer.

I am not saying this is the answeroon Mr. Central but there were instances like that.

JUDGE KINKES: Perhaps Mr. Bitting should be given an opportunity to answer your question and perhaps we can get the answer tomorrow.

MR. FOLEY: That is reasonable.

By Mr. Foley:

Q Right under that Mr. Congress, your discount drops from 22.0 percent to 20.5 percent: Joseph Berlin and Son on 183-C, the discount rate drops from 18.2 percent to 14.8 percent.

The same things happens to Congress Foods in March of 1966, going from 22 percent to 20.5 percent, and Belle Park Goods in March of 1966 went from 22 percent to 20.3 percent.

Your Honor, with exception of the pending question, I have no other questions on 183. Mr. Schaefer suggested to me at lunch it might be more useful if he were permitted to cross-examine on 183 at this time and it is a major day and we have spent most of the major part of the day on it.

JUDGE HINKES: I have no objection to that. I don't see any point in running any later than this particularly when the witness is under some obligation to do some home work.

Consequently, I will call a recess at this time and we can resume at 10 o'clock with your cross-examination of the witness, Mr. Schaefer.

(Whereupon, at 4:00 p.m., was recessed to reconvene at 10:00a.m., Wednesday, October 24, 1973.)

P R O C E E D I N G S

JUDGE HINKES: The hearing will be in order.

I believe you had finished your examination of the witness with respect to Commission Exhibit 183.

MR. FOLEY: I had, Your Honor, except for a pending question which we left with the witness over night to see if he could answer for us -- the reason for some of the changes on the figures used on 183 as it is now presented to the Court and on an earlier version that was withdrawn.

JUDGE HINKES: Perhaps you better take that up before Mr. Shaffer commences.

MR. MATHIAS: Before you start I would like to ask one favor of counsel for both respondents, let us know some time during the day the order in which they expect to take up some of the exhibits. Many of the exhibits were prepared some time ago, and it would expedite the cross examination, I believe, if Mr. Bitting could have some idea of how to look into his notes and prepare his mind for the cross examination rather than having him to go through all of these things during the course of the cross examination.

JUDGE HINKES: Yes, it might be helpful if you could decide between yourselves how you wish to take the exhibits up. I do not think you need do it immediately. We are only concerned now with 183 as it is.

MR. FOLEY: Yes, Your Honor.

JUDGE HINKES: Some time during the morning we might have a chance for you to get together to decide the order.

MR. MATHIAS: That would be fine.

JUDGE HINKES: Very well.

Whereupon,

R. JOHN BITTING

having previously been duly sworn, testified further as follows:

CROSS EXAMINATION (Cont'd)

BY MR. FOLEY:

Q Mr. Bitting, yesterday afternoon when we left off I believe that I had asked you if you could explain the changes that you had made in the dollar amount of sales and discount rate for Mr. Central and Congress Foods on Exhibit 183-B and Joseph Berlin & Son on 183-C, and I guess Mr. Central and Congress Foods again on 183-D. Perhaps we can take them one at a time.

With reference to Mr. Central on 183-B you originally had presented the dollar amount of sales as $3,184.45; is that correct, sir?

A That's correct.

Q And on the exhibit as it is now presented at the hearing you state that the dollar amount of sales is $3,442.98; is that correct?

A That's correct.

Q And the discount rate has changed as a result of the use of a different dollar amount of sales from 25 percent earlier to 23.1 percent as the exhibit is now presented.

A That's correct.

Q Now, can you explain the difference where this approximately $250 came from on your present exhibit?

A The worksheets which were used in the original worksheet; that is, the basic calculation sheets, I was not able to find in my notes. These were prepared of course, as we said yesterday, over two years ago. I did go back and try to reconstruct for all of these companies you mentioned the figures which are presented on the original CX-183 tabulation and was able to come up with some information as to the possible reason for the change.

In the case of Mr. Central for 183-B, the original tabulation included the purchase of butter -- the route book showed a red figure at the bottom of each page, and I used that figure. That figure is a figure actually which appears in the original 183-A.

Q Mr. Central is in fact on Page 183-B?

A Yes, but on the original worksheet we had only two pages for the two periods that was split up.

Q I am nost sure I understand that. Originally you used the figure of $3,184 with a dollar amount of sales of Mr. Central for the month of February, 1966, is that correct?

A That is correct.

Q And that figure was obtained from the bottom of the Borden route book entry for Mr. Central, is that correct?

A That is correct.

Q And you mentioned something about butter. Butter was excluded, is that the idea?

A We weren't sure. And last spring going through this and revising it we weren't sure, so I did then use the exact figures which appeared as the daily purchase figures in the right-hand column of the route book for this particular customer and came out with the present figure on CX-183-B.

Q Well, the present figure of $3,442.98 includes everything on the route book page for Mr. Central, is that correct?

A Yes, sir.

Q Nothing is excluded.

And earlier some item or items were excluded from your calculations, is that correct?

MR. MATHIAS: Your Honor, I object to mischaracterization of his testimony. He said he did not know whether or not the other products had been excluded from the other figures.

MR. FOLEY: Let me clarify that. If my characterization of the witness' testimony was incorrect the witness could tell me that. But I will rephrase the question.

BY MR. FOLEY:

Q Could you state this $250 figure you believe, although you are not certain, is as a result of eliminating some item or items from those items sold to Mr. Central; is that true?

A It could possibly be that, but we have no way of pinpointing it.

Q All right.

You made a reference to butter in this connection. What is the relationship of the item butter to the difference of the two figures?

A We know from the route book information that Mr. Central did purchase butter.

Q All right.

A And that cost was included in the right-hand column in the appropriate page in the route book for Mr. Central, and that was included in the revised CX 183-B figure.

Q Butter is included in the figure as it now appears on 183?

A All products as they appear on the route book are included. I am just saying that the possibility of the several hundred dollars difference may have been due partly to this butter matter. The route books, as you know, have been back and forth between myself and respondents' counsel, and certain tapes which were on the route book pages have been lost. That is very possible that the original runthrough, the original tabulation, that I did use the tape which was on this particular

~~tape~~ page.

Q All right. I think I understand.

A However, I want to bring out one other fact in connection with Mr. Central.

Q All right.

A I did discover last night an error in transcription. The figure as it appears now on CX-183-B of $3,442.98 should be slightly less, $3,407.33. This does change the discount rate from 23.1 to 23.3 percent, only a two-tenths of 1 percent change.

I did discover that last night in this checking.

Q The figure should be $3,407.33 and 23.3 percent for discount rate, is that correct?

A Yes, sir.

MR. FOLEY: I have no objection if there is some motion to amend the exhibit as reflected in the witness' testimony.

MR. MATHIAS: We will see that the exhibit that is offered will note that correction.

JUDGE HINKES: Without objection, then, 183 is amended accordingly.

BY MR. FOLEY:

Q Now, with reference to Congress Foods for February, 1966, as you present the dollar amount of sales for Congress Foods today on Exhibit 183-B.

You state that the amount is $1,070.81 -- excuse me, Your Honor, maybe there is something for us; we tried to have some exhibits sent over.

JUDGE HINKES: Off the record.

(Short recess.)

BY MR. FOLEY:

Q I believe I was asking you about Congress Foods, Mr. Bitting.

A Yes, sir.

Q Your earlier figure that you had reported for Congress Foods' dollar amount of sales; that is, the Borden Company's dollar amount of sales to Congress Foods, was $995.93; is that right?

A Yes, sir.

Q And the earlier discount rate that you had reported was 22.0 percent in comparison with the 20.5 percent reflected on this exhibit, is that right?

A That's correct.

Q Now, can you explain the addition of some $75 in sales to your present calculation?

A Here again the figure used at the bottom of the page is the figure which appeared on the original worksheet in the revised CX-183-B. I added the actual daily transaction and came up with this dollar figure of $1,070.81. The basic worksheet showing the items which I pulled off is not available.

This involved a customer who also purchased butter, and the difference may be due to the butter purchases. But I have no way of knowing.

Q Well, would the same situation prevail for Joseph Berlin & Son in which from March of 1966 where you increased the dollar amount of sales by the Borden Company to Joseph Berlin ~~by~~ of some $824 to some $1,014?

A No, that is a little different situation.

Q All right.

Could you explain that situation?

A The original CX-183 prepared over two years ago omitted close to $200 transferred from another route for the first four or five days of the month of March, 1966. That has been picked up and has been included on the present CX-183. This company had no butter purchases, so that would not enter into this picture.

Q And again from March of '66 you made certain changes for Mr. Central and Congress Foods as reflected on 183-D.

Do you know the reason for those changes?

A There must be a misunderstanding on my part. My notes did not indicate -- you did not ask about Mr. Central in March.

Q I am sorry.

A You asked for Mr. Berlin, Congress Foods, and Bel Park in March of 1966.

Q All right.

Can you tell us the reason for the change in Congress Foods in March of '66?

A Here the percentage dropped from 22.0 to 20.5. I was not able to pinpoint this change in the dollar sales. I did in the original tabulation use the total figure, use a total figure at the bottom of the route book page for this particular customer. In the revised CX-183 I did use the actualy daily purchases.

Q Well, was butter involved again in sales to Congress Foods in March of '66?

A Butter was purchased for this particular customer during March of '66.

Q And Bel Park Foods, could you explain the change in your figures for Bel Park Foods for March of '66?

A Of course likewise here the two-year old worksheets weren't available. There are several amounts in the route book which are not too clear, and it may have been a misinterpretation on my part in the original exhibit of CX-183 where I used, interpreted the figure differently than I did in the revised CX-183.

Q All right.

Was butter involved in the Bel Park?

A Butter was purchased by this particular customer in March of '66.

Q Then you are saying it is possible the difference between the figures for many of these stores, with the exception of Joseph Berline & Son, might result from the elimination of butter in your first preparation and its inclusion in the second preparation presented today?

A Yes, sir.

Q All right.

JUDGE HINKES: Let me ask you something that I seem to recall from yesterday's hearing.

Wasn't there one store that had a change in its discount percentage from something like 18 percent to 14 percent or vice versa?

THE WITNESS: This Joseph Berlin store on CX-183-C did have a drop in the percentage from 18.2 to 14.8 on the revised CX-183-C, and this is a store where in the original preparation, the preparation of the original exhibit, the $200 transferred from another route to this particular customer was not picked up.

JUDGE HINKES: That is $200 of the total amount being what? I am trying to get some idea of it.

THE WITNESS: $1,014.

JUDGE HINKES: So roughly speaking about 20 percent had been overlooked?

THE WITNESS: Yes, sir.

JUDGE HINKES: I see. Very well.

MR. FOLEY: May I ask a question on that?

BY MR. FOLEY:

Q If the route number you now give for Joseph Berlin & Son on C is 10W, where does the extra $200 come from?

A Last night I had only the particular route books with me, and the transfer did not appear in the route books I had with me, these four route books covering the four different companies. The route book page does show a charge of $215 for the first four or five days of March, 1966. However, it does also show a balance from the last day of February which I deducted from the $215.

Q Perhaps you could --

A There is no indication there as to the transfer. There were a number of instances where the routes were changed during a month, and it is a matter of going through all the route books and picking up this particular customer for the first four or five days of the month.

Q Could you show me the route book for Joseph Berlin & Son, 10W?

A Yes, sir.

Q Perhaps I can understand better what you are saying.

I see. There are no entries in route book 10W for Joseph Berlin for the first six days of March, 1966, is that right?

A That's correct, except a total figure noted as 3/5, March 5th of $215.

Q And 13 cents, is that right?

A Yes, sir.

Q And then there is a figure on the bottom of the page of $824.63, is that right?

A Yes, sir.

Q Is that figure, $824.63, the sum of the other figures appearing for sales to Joseph Berlin from March 7th through March 31 of 1966?

A Relying on the tape which is attached to this particular page it appears as though the 824 figure is the total of the sales from the 7th of March through March 31st.

Q Is the tape something that you prepared, Mr. Bitting?

A These tapes were prepared by the billing department of the Borden Company and were attached to certain pages by them.

I might also point out on this March period, beginning the period of March 1 through March 5 where they show sales of $215, that there was a balance from 2/16/66 of $24.90, evidently a carryover balance from the previous month which I deducted in order to arrive at the March, 1966, sales figure.

Q Well, I am not quite sure I understand what you say when you say you deducted the balance of $24.90. On your first calculation that you had earlier prepared for Joseph Berlin you used the figure, $824.63 of the dollar amount of sales to Berlin, which is exactly the same as the figure that appears on the bottom of the route book page in red and which is the result of the addition on the attached tape from the Borden Company; is that correct?

A That is correct.

However, this tape summarizes three out of the four weeks in March with a total figure. We are assuming the tape is correct.

Q All right.

So that apparently from the face of it if the addition on the tape is correct and if the $824.63 figure represents the summation from March 7 through March 31, you didn't subtract $24.90 when you originally prepared the calculation for Joseph Berlin, is that right?

A That is correct.

Q Now, when you came to revise 183 you added a figure. It looks like about $190, as a matter of fact. Is that right?

A Yes, sir.

Q So that would be $215 less your $24.90, or approximately $190; is that right?

A It would be the $215 less the $24.90 from the previous month.

Q So when you subtracted the charge it was in your second calculation, the charge of $24.90?

A Yes, sir.

Q And it doesn't tell you in the route book where the $215.13 came from the first six days of March, is that correct?

A It does not.

Q And you, however, did confirm this $125-figure at some time or other by looking, by finding it some place else in another route book?

A Yes, sir.

Q But you cannot recall where you found it.

Yesterday I offered in evidence as Respondent A&P Exhibit 32, I believe it was, Your Honor, the A&P summary, Chicago and suburbs. I didn't have my copy here, and Mr. Mathias has provided me with a xeroxed copy this morning, which I will ask to have it marked so we can have in for the record.

JUDGE HINKES: That was not offered, as far as I know. Are you offering it now?

MR. MATHIAS: It was not offered.

MR. FOLEY: Which one was offered?

JUDGE HINKES: You marked it for identification.

MR. FOLEY: I am sorry. May I have this marked for identification?

JUDGE HINKES: It is already marked 32, Respondent's A&P 32.

MR. FOLEY: I mean physically.

JUDGE HINKES: Of course.

(Whereupon, Respondent A&P Exhibit No. 32 was physically marked for Identification.)

BY MR. FOLEY:

Q Mr. Bitting, I show you Respondent's A&P Exhibit 32 for identification and ask you if you recognize that document?

A Yes, sir.

Q What is it?

A It is a document from the investigational files of the Commission, a copy of the document from the investigational files of the Commission showing the A&P store summary for Chicago and suburbs area for the week ended February 5, 1966. The document is from the Borden Company of Chicago, Illinois.

Q Did you use this exhibit, Respondent's Exhibit 32 for identification, in preparation of Commission Exhibit CX-183 that you are offering here today?

A It was used in preparation of that exhibit.

Q Was it used in particular for the preparation and the calculation by yourself of the total purchases of 11 private-labeled items from the Borden Company in February, 1966 by A&P?

A It was used.

Q For that purpose?

A For that purpose.

Q Now, If I may ask you on that, on the bottom of the exhibit there is a handwritten statement, "P.L.," the number "32,835.48." There is another written phrase, "Borden - 41,049.47."

Is that your handwriting, Mr. Bitting?

A That is not my handwriting.

Q Do you know whose handwriting that is?

A I have no idea.

Q Do you know what they mean?

A It appears to be a breakdown --

MR. MATHIAS: Your Honor, I would like the witness to not answer a question if he does not know.

JUDGE HINKES: We do not want an opinion on it. If you know, tell us, but I do not think the question calls for an opinion.

BY MR. FOLEY:

Q Do you know what that figure that I have described to you means?

A I did not check out those figures.

Q I will rephrase the question.

Do you have an opinion as an accountant who examined the documents, the particular Respondent's A&P Exhibit 32, as to what they mean?

MR. MATHIAS: I am going to object in light of the witness' statement a moment ago that he has not checked out the figures, and it would be mere speculation.

JUDGE HINKES: Are you prepared without checking out the figures to tell us what you think these figures indicate as far as accounting is concerned, Mr. Bitting?

THE WITNESS: I have an opinion as to what they indicate.

JUDGE HINKES: Very well. You will tell us.

THE WITNESS: I should tell you?

JUDGE HINKES: Yes.

THE WITNESS: The P.L. in the handwritten information I would think stands for "private label," and the Borden would stand for the Borden information.

JUDGE HINKES: The Borden label, you mean?

THE WITNESS: Borden label information.

BY MR. FOLEY:

Q Mr. Bitting, in your preparation, as a matter of fact, of CX-185 in which you set out the private label products purchased and the Borden label purchases of those identical products by the A&P Company, you did in fact prepare one for the week ending February 5, 1966, did you not?

MR. MATHIAS: I would like the question reread. I believe there is an error.

JUDGE HINKES: Would you reread it, please?

(Question read.)

MR. MATHIAS: Your Honor, I was in error. I thought he was referring to CX-183.

JUDGE HINKES: Very well.

THE WITNESS: I did prepare.

BY MR. FOLEY:

Q Now, on 185 for the week ended February 5, 1966, you determined that the private-labeled products purchased were 212,851 points?

A That's correct.

Q And that the Borden label purchases of identical products was 134,065 points?

A That's correct.

Q Well, you have just given your opinion that the private label and Borden label figures there or that the figures next to the words P.L. and Borden indicate respectively private label and Borden label.

Can you explain the difference of the figures on Respondent's A&P Exhibit 32 and the figures used on CX-185 for that same period?

MR. MATHIAS: I would object to the witness being questioned about figures on a document not offered and received in evidence.

MR. FOLEY: Well, all right. To solve that problem I will offer it in evidence, Your Honor. The witness has already testified he used it inpreparation, that it is an underlying document for CX-183.

MR. MATHIAS: Your Honor, I would object short of relevancy to this document. Just the fact he used it as an underlying document -- that is one of the reasons we prepare summary documents, so that all of the individual underlying documents do not have to burden the record.

Unless he can show some other relevancy, well, I see no basis for receiving this document in evidence.

MR. FOLEY: Your Honor, the basis of the relevance it is being offered is so I may ask the witness about the details of the undedying documents he used for the preparation of CX-183. If this document is not admissible, then 183 is not admissible.

JUDGE HINKES: Yes, I must receive Respondent's Exhibit 32 in evidence. The objection is overruled.

(Whereupon, Respondent's A&P Exhibit No. 32 was received in evidence.)

BY MR. FOLEY:

Q Now, my question, Mr. Bitting, is if you can explain the difference between the figure that you have used for private label products of 212,851 points for the week ended February 5, 1966, and the figure of 32,835.48 appearing on Respondent's A&P Exhibit 32.

MR. MATHIAS: Your Honor, I am going to object to the form of the question. Mr. Foley is asking Mr. Bitting to compare apples and oranges. He has already pointed out in the one exhibit he is dealing with points, and the way he read it off it is obvious there is a dollar figure.

MR. FOLEY: That is really the point. Is it a dollar figure on the bottom of the A&P Exhibit 32? I would like the accountant's opinion.

JUDGE HINKES: Now, let us go back a little bit here. I think we may be getting a little far afield considering this as Respondent's exhibit and complaint counsel's witness is on the stand.

Now, before the complaint counsel's witness can be asked to explain a document that has been received in evidenced offered in evidence and received by the Respondent, I think we will have to establish some connection.

Mr. Bitting, you said that you used Respondent's A&P Exhibit 32 in the preparation of 185, is that right?

THE WITNESS: Yes, sir.

JUDGE HINKES: Now, in using 32 did you have occasion to use the figures that we are speaking about on the bottom of that page?

THE WITNESS: I did not, Your Honor.

JUDGE HINKES: Did you make any comparison of those figures with anything else as you were preparing 185?

THE WITNESS: I did not.

JUDGE HINKES: Under the circumstances, Mr. Foley, I do not think this witness can be asked to explain any differences or similarities inasmuch as he did not use the figures contained, that you are speaking of, at any rate, contained on your Exhibit 32.

MR. FOLEY: Your Honor, I will ask the witness another question.

BY MR. FOLEY:

Q In preparing CX-183, Mr. Bitting, in particular in determining A&P's total purchases of the private-labled products from the Borden Company for the month of February, 1966, did you rely on the figure contained on the bottom of Respondent's A&P Exhibit 32?

A I did not.

Q Did you use that figure at all?

A I did not.

Q Didyou check those figures against your own addition?

A I did not.

Q How did you determine total purchases of the A&P Company from Respondent's Exhibit 32? How did you use that to determine total purchases of A&P of the private label products?

A I set up a worksheet for each one of the 11 private-labeled products, and for each one of the weeks ending in February; that is, February the 5th, February 12th, February 19, and February 26 I set out the quantity purchased during that week times the unit price and came up with what I designated as an extended cost. I did that for each one of the 11 products for each of the four weeks ending in February of 1966.

And the accumulation of those figures resulted in the figures shown on CX-183-B.

Q Now, for the week ended February 5, 1966, did you come up with a figure for the dollar value of the total private label purchases by A&P from the Borden Company on your worksheets?

A I did not summarize it that way. I have no idea. It was set out by product for each of the four weeks.

Q I see. All right.

MR. FOLEY: I have no further questions of the witness on this document, Your Honor.

MR. MATHIAS: Your Honor, may we take a five-minute break?

JUDGE HINKES: Yes, I think we will take a few minutes before you commence, Mr. Shaffer.

(Short recess.)

JUDGE HINKES: Let us continue.

I believe you had finished, Mr. Foley.

MR. FOLEY: Yes, with the exception of Mr. Bitting on 183.

JUDGE HINKES: Very well, Mr. Shaffer?

CROSS EXAMINATION

BY MR. SHAFFER:

Q First of all, Mr. Bitting, we have been furnished by Mr. Mathias with a set of documents which in the bottom corner have been marked Court Exhibits 2 thru 25. These are typewritten documents, the first of which is preparation of price comparison tabulations. I note that this set of documents does not include any description of Commission Exhibit 183 or the preparation of that exhibit.

Did you have such a document for Commission Exhibit 183?

MR. MATHIAS: Your Honor, excuse me. There should be one marked Court Exhibit 9. Mr. Foley questioned Mr. Bitting about that yesterday. It should be there.

JUDGE HINKES: Off the record.

(Discussion off the record.)

MR. SHAFFER: I note for the record that we had been supplied with a copy of such document which was stapeled to another document, and I inadvertently overlooked it.

BY MR. SHAFFER:

Q Mr. Bitting, Commission Exhibit 183 on each of the pages has a column called "Discount Rate." Did you in the course of preparation of this exhibit make any comparison of that discount rate with the discount rate on Commission Exhibit 138, which is the Borden discount schedule effective January 1, 1966?

A I did not make such comparison.

Q Did you make any attempt, Mr. Bitting, to determine the discount rate which would have been applicable to any of these stores under Commission Exhibit 138, the Borden discount schedule?

A I did not.

Q Is it possible to determine from Commission Exhibit 183 the discount rate which would have been applicable under the Borden discount schedule effective January 1, 1966? Do you have a copy of Commission Exhibit 138?

A Yes, sir.

Q In might be helpful to you in answering the question.

A It would not be possible to make that.

Q And isn't it in fact true, Mr. Bitting, that most of the figures appearing on Commission Exhibit 183 under the column Discount Rate do not correspond with any of the figures shown on Exhibit 138 under the column Discount Schedule?

A That's correct.

Q Mr. Bitting, with respect to --

MR. MATHIAS: Your Honor, can I have that last question and answer read back?

JUDGE HINKES: Yes, sir.

(Question read.)

BY MR. FOLEY:

Q Mr. Bitting, with respect to certain customers shown on Commission Exhibit 183 you indicate that these customers did not receive what you call a rebate paid by Borden. This includes Misicka's Foods, Floom, Greenview Fruit, and Madison

LaVeign Food Market.

Did you have any information available to you, Mr. Bitting, which would indicate that any of these customers paid less than the Borden list price?

A I did not have such information.

Q In your view based on your experience, which has been outlined in this proceeding, would not the presence of a published discount schedule such as Commission Exhibit138 raise a question in your mind as to whether you had all the information on customers which appeared to be paying the full list price without application of any discount schedule?

A From information received from Mr. Rouse' testimony I was under the impression that some of Borden's customers were billed at a net price by the driver which would account for the lack of a rebate memoranda.

Q I will not move to strike that answer as not being responsive since we will have to come to that in a moment, but I would like to ask first the question which I put to you; and I would like to have the reporter read that question, please.

JUDGE HINKES: Would you, please?

(Question read.)

BY MR. FOLEY:

Q My question, Mr. Bitting, is not whether Mr. Rouse' testimony satisfied you with respect to these customers, but whether this state of facts would raise a question in your mind as to whether you had all the information.

A It would raise that question.

JUDGE HINKES: Let me ask you, Mr. Bitting, were these customers whose accounts show no discounts, were those customers paying full list price?

THE WITNESS: I could not tell that because I didn't make that analysis.

JUDGE HINKES: So that as far as you can answer now the price that they were paying may have been something less, a net price, and not full list price from which there was no discount given?

THE WITNESS: Yes, sir.

BY MR. SHAFFER:

Q Mr. Bitting, did you attempt to obtain any other information other than the route books and rebate check register with respect to the prices being paid by these four customers that we have been discussing?

MR. MATHIAS: Your Honor, I am going to object. I think the witness is the wrong one to be questioned on that.

MR. SHAFFER: Let me ask it differently.

BY MR. SHAFFER:

Q Did complaint counsel turn over to you any information on these four customers other than the route books and check register copies?

A Complaint counsel did not.

Q Did you ask complaint counsel to attempt to obtain or to turn over to you any further information on these four customers other than the route books and check copies?

A Directly I discussed this with the complaint counsel. Complaint counsel was familiar with the situation.

Q With the fact that you could not say whether or not these customers were paying the full list price?

A Yes, sir.

Q Did complaint counsel show you a copy of a letter which they had received dated January 26, 1968, showing pricing information to these customers or showing information on pricing to these customers during the month of January, 1966?

A May I see a copy of the letter? Offhand I don't recall.

Q This is a letter dated January 26, 1968, from -- our copy is unsigned -- the signature is blank and is followed by the notation "In Charge - Law Department, Mid-west Division" and the initials JAG. The enclosures include one page captioned "The Borden Company, Chicago Metropolitan Region, Estimated Wholesale Store Value of Sales in Chicago, Evanston, Wilmette, Kenilworth, Winnetka, Glencoe and Oak Park, Illinois Areas."

The second enclosure marked as Exhibit B is captioned, "The Borden Company, Chicago Metropolitan Region, Wholesale of Sales and Discounts to Store Customers Other than A&P in

Chicago, Evanston, Wilmette, Kenilworth, Winnetka, Glencoe and Oak Park, Illinois Areas During January, 1966."

MR. MATHIAS: Before the witness looks at it, could complaint counsel look at it?

MR. SHAFFER: Certainly.

(Discussion off the record.)

JUDGE HINKES: On the record.

You may continue, Mr. Shaffer.

MR. MATHIAS: If the witness is going to be shown this I think it ought to be marked for the record.

JUDGE HINKES: Very well. We will mark this as Respondent Borden Exhibit RB Exhibit 13.

(Whereupon, Respondent Borden Exhibit RB Exhibit 13 was marked for Identification.)

BY MR. SHAFFER:

Q Mr. Bitting, I hand you RBX-13 and ask whether you have seen the letter or any of the enclosures prior to today?

A I have not seen this.

Q Did you review the Commission's investigatory files in this proceeding in conjunction with your preparation of the various exhibits you have testified to?

A I didn't review all of the files; certain files I did, but not the complete files.

Q And even though in the course of your preparation of

Commission Exhibit 183 you indicated with respect to these four customers that we are talking about now that you couldnot tell or did not determine whether or not they were paying a list price for the products they purchased? You did not ask complaint counsel for any information on those customers?

A I discussed this, as I stated earlier, with the complaint counsel.

Q Did you ever ask complaint counsel to obtain, or did you ever ask any representative for Borden, any representative of Borden to furnish you with copies of the billings or invoices to these four customers or to any other customers on the O'Hare route?

MR. MATHIAS: Your Honor, I am going to object to that question insofar as it asks if this witness contacted Borden. I believe there is no underlying foundation that this witness has ever dealt directly with the Borden Company or A&P in obtaining documentation. I think the record is quite clear throughout the entire proceedings that the investigational portion of this matter was not handled by Mr. Bitting but was handled by complaint counsel and the investigating attorney.

JUDGE HINKES: That does not necessarily preclude the possibility that the witness did communicate, and I think that the witness can be asked that very question.

BY MR. SHAFFER:

Q Do you recall the question?

A I did not contact Borden officials for this type of information.

Q For billings or invoices to individual customers, either the four we are discussing here or any other customers on Borden's O'Hare routes?

A That's correct.

Q Mr. Bitting, calling your attention to RBX-13, Exhibit B, Page 8, there is an entry for Greenview Fruit Market. Under the column, which on the first page is headed Dollar Amount of Sales per Price List of October 13, 1964, there appears a dollar figure. That heading is not repeated on each page of the exhibit, but such a figure appears in the first column of Page 8.

MR. MATHIAS: Your Honor, has a question been asked?

MR. SHAFFER: No question has been asked, and I am not reading the figures into the record.

BY MR. SHAFFER:

Q The second column is headed Dollar Amount of Discount Paid. Once again, the column headings are not repeated on each page. The second column next to Greenview Fruit Market is blank on Page 8.

The third column is headed Applicable Discount Rate Per Discount Schedule of January 1, 1966, and a percentage figure or a figure -- the percentage sign is not repeated for each figure on the exibit -- but a figure appears next to the heading of the Greenview Fruit.

And finally, the fourth column, which is headed on the first page Discount Rate Actually Paid, shows another figure for Greenview Fruit. And next to that figure is an asterisk.

At the bottom of the page is an asterisk with a notation --

MR. MATHIAS: Your Honor, I am going to object to the reading of any notations from this document into the record when the document itself is not in the record. I would have waited until the question was asked, but now that information from the document is going to be read into the record I am going to object.

JUDGE HINKES: I do not think it is appropriate for you to read into the record, Mr. Shaffer, data contained on a document which may, for all we know, be totally inadmissible.

MR. SHAFFER: Yes, sir.

JUDGE HINKES: And consequently I think that your line of questioning in its entirety must be stricken inasmuch as it does in effect read certain items from that document, even though you have excluded figures. I don't think that is quite proper.

MR. SHAFFER: May I speak to that?

MR. FOLEY: Could I say something in reference to our rights? We have not raised objections as to the authenticity of documents produced from the Borden Company with certain exceptions. A vast host of material from the Borden Company has been placed before Your Honor, and we have waived objections as to authenticity of those documents. If the objection by complaint counsel is to the authenticity of this document and that is the manner in which it is going to proceed he would have some legitimate complaint of the authenticity of the document after he has had an opportunity to review. But just a blanket objection, I think --

JUDGE HINKES: I think you are jumping ahead of us, Mr. Foley. The document has not been offered in evidence and has not been objected to. I am simply saying to pick up a piece of paper and recite some of its contents is improper, period.

MR. SHAFFER: May I speak to the objection?

JUDGE HINKES: Yes.

MR. SHAFFER: I have very carefully avoided reading into the record any of the data contained in the document. I think that is appropriate on a number of grounds for such a limitation at this point.

The important point about this document and the question which I intend to direct to the witness based on the matters about this document that I have related so far, is that this is a document that was submitted to the Federal Trade Commission, the investigational attorney in this case. It was a document which has, I assume, been part of the investigational file in this matter. It is a document which, by its form and by the notations on it, not by the information contained in it but by the notations on it, raises serious questions as to the completeness and the accuracy of the document which this witness prepared.

My questions go not to any of the information contained in this document but to the accuracy of this witness' exhibit as based on the indicia which were in the files of the Federal Trade Commission at the time it was prepared.

JUDGE HINKES: Let us go back again. I think both of you are jumping ahead of the situation here. You are attempting, Mr. Shaffer, to impeach a proferred exhibit, 183, and you are attempting to do so by reason of a letter which you claim was sent by Borden to the Commission and should have been considered but was not, all of which may be quite true.

But as we stand here at this moment, it is nothing more than a piece of paper which, for all we know, was never sent by Borden, never received by the Commission, and never should have been considered.

Now, you will have to establish your basic ground work first before you have got anything.

MR. SHAFFER: Let me ask first if complaint counsel will dispute the fact it was sent to the Commission.

MR. MATHIAS: I do not dispute that that letter was sent to the investigator. I have no objection as to the authenticity of the document. That is not the basis of my objection, and I believe Your Honor has properly noted that in your ruling.

The objection here is to the reference to a document that is not in the record that may in some way -- first of all, I would like to note the information is in the record for the same period but that the document may in some way impeach Mr. Bitting and in other ways may support.

The only way that this record will be clear is if the document is in evidence. Then complaint counsel will have no objection to Mr. Shaffer questioning this witness as to documents that are in evidence. But as to a piece of paper which the witness himself has stated he has never seen, I do not see how he can possibly develop anything along this line of questioning.

MR. SHAFFER: The problem is, Your Honor, in order to impeach this witness it is not incumbent upon us to put into the record a document which contains a great deal of information that is either not relevant to this proceeding or is not supported in various ways. At this point in the proceeding this is complaint counsel's case. I am not interested in putting any of this in the record. This information relates to a period one month before the period chosen by complaint counsel.

The critical thing that this document does is to put the Commission on notice that if they intend to show what they purport to show in this exhibit as a discount rate, it is necessary for them to have the billing or the invoice from which that information can be obtained.

I would be happy to offer this document as our exhibit with the dollar amounts, the figures on it blocked out because I do not think it is appropriate -- the problem is that complaint counsel have this document and Mr. Bitting should have been shown it, should have had access to it and hasn't. I think for us to question him about it, about what difference it would have made in the preparation of this exhibit, to require us to put this letter into evidence, is singularly inappropriate.

JUDGE HINKES: I think you are on the horns of a dilemma, Mr. Shaffer, and I do not know how you are going to be able to get off. On the one hand you want to use the document forpurposes helpful to your case, but you do not want to have the document used in its entirety -- for reasons that may be apparent only to yourself.

The document is not one that has been received in evidence and cannot be used to interrogate a witness. The fact that the Commission received the document, which apparently is now admitted, does not make the document admissible necessarily. But, in any event, you are not offering it. Consequently, I have nothing on which to rule. It still remains a piece of paper which is not in evidence.

Now, perhaps if you make an offer and I receive objections I shall still think it should not be received in evidence. In any event, at this moment it is not in evidence by your choice, and you cannot, nevertheless, proceed to use a document as if it were in evidence.

MR. SHAFFER: All right, Your Honor.

I may offer this document at the end of my examination of Mr. Bitting, but I do not intend to do so at this point.

JUDGE HINKES: Very well.

MR. SHAFFER: We will move on to another subject.

BY MR. SHAFFER:

Q Mr. Bitting, calling your attention to Exhibit 183-D. I note that some of the customers listed there are identified with the route number 18W.

Could you take out the route book for route 18W for the month of March, 1966, please?

A Yes, sir.

Q Would you open that route book to the page showing the Centrella store at 128 Chicago Avenue, Oak Park?

I have a parentheses after that for the names James Cox.

A Yes, sir.

Q This is Page 15 of the route book, is that correct?

A That is correct.

Q Which is actually the back of one and the front of another page that spreads across two leaves of the book, and stapled to the second page is an adding machine tape.

A Yes, sir.

Q Mr. Bitting, can you tell from this page what products this Centrella store purchased during the month of March, 1966?

A The purchases consisted of milk in gallon jugs, one-half gallon, and quarts, which I interpret to be paper; chocolate milk in the quarts; buttermilk in the quarts; 2 Percent in the gallon container; Gold Del in one-half gallon; Fortified Skim; 32 Percent Cream in the one-half pint; Sour Cream in the 16-ounces; French Onion Dip, 8-ounce container; another kind of dip designated with the initials which appear to be XX; Sour Half and Half in the pints; Trip Whip in the 8 ounces; Yogurt in the one-half pint; Creamed Cottage Cheese in the L. C., 16-ounce size; Creamed Cottage Cheese in the S.C. 8-ounce size; Pine, which I understood stood for pineapple cottage cheese; the Chives Cottage Cheese; Butter. That is all.

Q Mr. Bitting, isn't there an entry there for eggs at one point?

A Excuse me, there is one entry for eggs.

Q Now, Mr. Bitting, from this route book can you tell us how much this customer paid for any one of those products which you have enumerated?

A I cannot.

Q Mr. Bitting, I wish to read to you a part of the testimony of Mr. Cox. Were you present when Mr. Cox testified in Chicago?

A I am not sure.

Q All right.

MR. MATHIAS: Before you read that could we have the reference?

MR. SHAFFER: Page 3954 of the transcript.

BY MR. SHAFFER:

Q While they are getting that out, perhaps you would like to get out the check register which relates to this store for the month of March, 1966.

Mr. Bitting, let me read to you the transcript beginning at Page 3954, and I will ask you a question relating to this after I finish it.

Starting at Line 20, the question was asked by Mr. Palewicz of Mr. Cox: "Question - During the period 1966, Mr. Cox, did you ever receive any promotional allowances?"

"Answer - Yes, I would say so.

"Question - And how were these promotional allowances paid to you?

"Answer - They were taken off the bill.

"Question - They would be taken off the bill -- what do you mean by that, sir?

"Answer - Well, if they give you a sale item they would reduce the price off your invoice."

Now, Mr. Bitting, where on either the check register copy which you have or the route book pages we have referred to or on Commission Exhibit 183 are such promotional allowances reflected?

A They are not specifically set out. The only comment I have is that they must be reflected in the paid column for each day's transaction, which was a column prepared summarizing the day's purchases by the route delivery man.

Q Do you have any independent information as to whether or not these promotional allowances were in fact included in that paid column, or is that your assumption based on the documents that you have been working with?

A That is the latter.

Q So that if that assumption were true, the price shown in the paid column on the route book would not in fact agree with the Borden list price, would it, Mr. Bitting?

A Yes, sir.

Q It would in fact be something less than the Borden list price, wouldn't it, Mr. Bitting?

A Yes, sir.

Q So that the amount shown under dollar amount of sales on Commission 183 in the case of Mr. Cox, the Centrella store, would reflect some amount less than the Borden list price.

MR. MATHIAS: Your Honor, I am going to object at this point. There are an awful lot of assumptions put in the question which I believe are unfair. The testimony that Mr. Shaffer has referred to and read into the record does not state Mr. Cox received a promotional item every day or every week. It only says that he did receive some promotional items and these were taken off the billings. There is nothing that indicates that this particular book includes any such items.

JUDGE HINKES: I guess that is true. I think that perhaps the questions should be modified to say that if there were promotional allowances given to the store and if those promotional allowances were reflected in the sale price that is noted on the records, the result is a price which is lower than the list price of Borden for that particular commodity. Is that not correct?

MR. SHAFFER: I think that is an appropriate way to phrase the question.

BY MR. SHAFFER:

Q With respect to Exhibit 183, the amount shown in the column, Dollar Amount of Sales, for the Centrella store which had James Cox' name, if Mr. Cox received during the months of February and March, 1966, promotional allowances which were taken off the bill or off the invoice, as the expressions were used interchangably by Mr. Cox, those promotional allowances would reduce the dollar amount of sales below the list price for such sales.

A That's correct.

Q And am I correct in understanding, Mr. Bitting, that you did not have available to you any of the bills or invoices of the type to which Mr. Cox referred in his testimony? Let me rephrase that.

Did you have available to you any bills or invoices to Mr. Cox from the Borden Company for the months of February or March, 1966?

A I did not.

Q Did you or to your knowledge did anyone else on the Commission staff or complaint counsel request such bills or invoices from Mr. Cox?

A Not to my knowledge.

Q And did you or anyone else on the Commission staff or complaint counsel request such bills or invoices to Mr. Cox from Borden?

A I did not, not to my knowledge.

Q Did you at any time before or after Mr. Cox' testimony ask complaint counsel to obtain such bills or invoices for you in use of or preparation or modification of these exhibits?

A I did not.

JUDGE HINKES: Would this be a convenient time to break for lunch?

MR. SHAFFER: It would be fine.

JUDGE HINKES: We will resume in this room at 1:30.

(Whereupon, at 12:00 o'clock noon the hearing was adjourned to reconvene at 1:30 o'clock p.m., this same day.)

* * *

AFTERNOON SESSION

JUDGE HINKES: The hearing will be in order.

Mr. Shaffer, you may contine.

Whereupon,

R. JOHN BITTING

having previously been duly sworn, testified further as follows:

CROSS EXAMINATION (Cont'd)

BY MR. SHAFFER:

Q Mr. Bitting, on Commission Exhibit 183-C you show an entry for Mayfair Foods, 9655 Franklin in Franklin Park, and indicate a route No. 3W.

Would you get that route book for the month of March, 1966, please? Would you turn to the page which contains the information on Mayfair Foods?

A Yes, sir.

Q This is Page 6 of the route book, is that correct?

A That's correct.

Q Mr. Bitting, referring to that route book, and, if necessary to the check register copies and to Commission Exhibit 183, I would like to call your attention to the testimony of Mr. Lasorso who was the operator of that food store beginning on Page 2700 of the transcript. I will read to you Mr. Lasorso's description of specials on dairy items, and I will ask you to identify where these specials appear on the documents that I have referred you to.

"Question - Now, in addition did Borden offer you during 1966 specials on dairy items?

"Answer - Yes.

"Question - And the value of that would be what, 5 or 10 cents an item?

"Answer - Depends on what they were. They had a program every week. They would run one item one week and all the stores got that.

"Question - And this was of value to you in promoting the sale of dairy products in your store?

"Answer - Yes.

"Question - And the amount of the reduction, how was it reflected -- in a lower net billing to you? I mean, in other words, did you receive a credit?

"Answer - No, it would be they would on the net billing reduce the price on it. If it cost 42 and they give you a nickel off, they charged you 37.

"Question - And a net charge was reflected in a reduction off the --

"Answer - List.

"Question - -- Billing price?

"Answer - Right.

"Question - They did not supply you with a check?

"Answer -- No."

From these records -- the route book, check register copy, and Commission Exhibit 183 -- can you tell us where such special pricing would be reflected?

A If such special pricing occurred during this month of March, 1966, it would not appear in this particular route book page for this particular customer.

Q And where would such pricing be reflected on Commission Exhibit 183?

A If it occurred during this month it would be reflected in the total dollar amount of sales that would be reflected in there. It wouldn't be set out specially.

Q So that as with the case of Mr. Cox the dollar amount of sales, if there had been specials during these periods of time, would reflect prices less than the Borden list price?

A It would.

Q And as with the case of Mr. Cox it is not possible to tell from the records on which you based Commission Exhibit 183 or from Commission Exhibit 183 the price that Mayfair Foods paid for any of the individual items which they purchased, is that correct?

A That's correct.

JUDGE HINKES: Let me understand, Mr. Bitting.

183 in making comparisons used what cost for these non-A&P stores? The cost as represented by the totals or the cost as represented by the item multiplied by the list price for that item?

THE WITNESS: The dollar sales figure on CX-183, Your Honor, does represent the total dollar figure on a daily basis from the price put for a particular customer. The price book does not set out the unit price for each particular product. It sets out the quantity and then a dollar figure for that day's purchases.

JUDGE HINKES: Well, what I want to know is whether the cost to these stores that you used in making comparisons reflect what the store actually paid or whether they reflect the item multiplied by its list price?

THE WITNESS: It reflects the price shown in the appropriate page of the price book on a daily basis for the items purchased, and then the CX-183 also reflects the amount of the rebate memoranda where those did appear for a particular customer.

JUDGE HINKES: Forgetting the rebate memoranda for a moment, all I am interested in knowing is whether that price is a calculated price using list price or whether it is the actual price charged to the store before the rebate memoranda were applied.

THE WITNESS: It is the price the driver computed at the time of the delivery and recorded it in his route book for the entire day's purchases.

JUDGE HINKES: What price did the driver use; do you know?

THE WITNESS: We don't know.

JUDGE HINKES: Then do you know whether or not the promotional allowances were included in the price that the driver used?

THE WITNESS: Not from the price book information.

JUDGE HINKES: Well, do you know it from any stores?

THE WITNESS: On the testimony of Mr. Lasorso on which Mr. Shaffer just read indicates that the case of a promotional allowance that the driver would consider that in arriving at his total billing for that day's delivery as recorded in the CX-183.

MR. SHAFFER: May I just interject with one question at this point, Your Honor, because I do not think that there is any way to tell -- let me ask you.

BY MR. SHAFFER:

Q Is there any way to tell whether in preparing the invoice for the store the driver took the figure shown in this book, the route book, entered that on the invoice, and subtracted off either special pricings or discounts of one manner or the other with respect to charge customers we have testimony would treat it in a different way, or whether in the alternative the driver took the special price into account in reaching the total which he reaches?

A We have no way of determining whether it was taken off after the driver totaled up the day's purchases or figured in a net price before he got to that total for a particular product, subject to the promotional allowance if there was one.

Q That is right.

Now, as I understand your testimony with respect to Commission Exhibit 183, if the driver took off a promotional allowance before he totaled the figure; in other words, if his total is the net after the promotional allowance, then the dollar amount of sales figure on Commission Exhibit 183 would be something other than the list price for that customer, is that correct?

A It very well could be. Received a promotional allowance.

Q Right.

On the other hand, if the route book figure reflects the list price for these items, if a particular driver entered the list price for the particular items and then on the invoice which he delivered to the store subtracted the promotional allowance or any other discount, that information would not be taken into account anywhere in either Commission Exhibit 183 or the underlying documents, is that correct?

A I believe that is correct. Mr. Rouse when he submitted these route books to us on November, 1970, testified that they were the records of the accounts receivable between Borden and the customer.

Q Well, I am not sure that was Mr. Rouse' testimony, Mr. Bitting. In fact, I think there is testimony in the record that indicates that these books were kept in different ways. I think Mr. Rouse was very careful to point out at the subpoena return and before his testimony before the Commission that there were discounts that were taken off the invoices.

Now, you may be relying on part of his testimony, but the other part of it is the problem we are trying to focus on here.

Now, in distinction to the process which we have just talked about of using the total dollar figure representing the full product line reflected in these books, when you prepared the information shown for A&P on Commission Exhibit 183 is it correct that you took each of the 11 products we are considering, took A&P's invoice price for thoseproducts, and extended that price to determine the price actually paid by A&P?

A That's the procedure, yes.

Q What were the 11 products included in A&P's purchases on Commission's 183-C, Mr. Bitting?

A The 11 products consisted of the/Homogenized Milk in the gallon, one-half gallon and the quart containers; 2 Percent in the one-half gallon container; Skim Milk in the quart and one-half gallon containers; Buttermilk in the one-half gallon and quart containers; Chocolate in the quart container; the whipping cream in the one-half pint container; and the Half and Half in the pint container.

Q Mr. Bitting, with respect, for example, to Homogenized milk in the half-gallon container, according to the weekly billing which has been marked as Respondent A&P Exhibit No. 32 for the week ended February 5, '66, A&P purchased homogenized half gallons in paper containers totaling $18,729.97, and then in a second entry purchased what is denominated homogenized private label half gallon, totaling $18,963.09.

Were both of those purchases reflected on Commission Exhibit 183?

A Only the private label purchases were reflected.

Q For example, on Mayfair Foods the example to which we have been referring on the route book Page 6, that shows that Mayfair Foods also purchased at a different time period, admittedly, but purchased in March half-gallons of homogenized milk, does it not, Mr. Bitting?

A Yes, sir.

Q Does that show whether those were in private label or Borden label?

A It does not show.

Q Mr. Bitting, for all cases in all instances where A&P purchased both private label and Borden label in the 11 products you have mentioned, does Commission Exhibit 183 reflect only the private label products purchased?

A It does.

Q And does it reflect only the private label pricing charged to A&P?

A It does.

Q Is it not true that in all cases where items were purchased by A&P in both private label and Borden label the private label price was lower than the Borden label price?

A Without checking offhand I would say that the private label was lower than the Borden label price, but I would have to make a check on that.

Q You do not recall any instance where it was higher in price?

A No.

Q Mr. Bitting, according to the record that you used to prepare Commission Exhibit 183, did A&P in any of its stores in the Chicago and suburbs area purchase all of the products which the route books show to have been purchased by the other stores listed on Commission Exhibit 183?

A I didn't make that analysis. The route books of course show the A&P Store purchases by store, but since they weren't being included in this document I did not, I had no reason to make such a comparison.

Q Mr. Bitting, if you will get out your copies of Commission Exhibit 183 I would like for you to compare for a moment the second entry on 183-A with the second entry on 183-C. This is for Gene's Food Shop.

***

allocated the advertising expenses on the basis of sales of dairy products?

MR. MATHIAS: Yes, to these customers.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Now, Mr. Bitting, you stated that you had invoices to eight customers other than A&P in the Hammond- Valparizo area. Were these the customers which are listed in the Complaint, or the Commission exhibits dealing with the alleged discriminations in this matter?

A They are.

Q Now, sir, did your review of these invoices and records reveal which, if any, of the four items listed on RAP Exhibit 90, page 3, were sold to A&P under private label?

A They did.

Q And what did they reveal in this regard?

A The only product sold to A&P under private label was the onion dip. That is, of the four products.

Q What are the four products listed on RAP Exhibit 90, page 3?

A Yogurt, Thirstee Smask, T-h-i-r-s-t-e-e-Smash, and Lite, L-i-t-e-, one word, Line, another word, milk and dips.

Q Now, sir, did Borden sell onion dip to A&P under Borden label during the time period of your study?

A They did not.

Q So they sold this product to A&P only under private label?

A That is correct.

Q Did Borden sell onion dip to other customers in this area during this same time period?

A They did.

Q Now, did your study reveal whether or not Borden sold the other three products listed on Respondent A&P Exhibit 90, page 3, to A&P and others in this area in this time period?

A My study showed that the yogurt, as well as the Lite-Line milk products were sold to the A&P stores as well as the non-A&P stores during this period. The studies showed that there were no purchases of product "Thirstee Smash" to either the A&P stores or the non-A&P stores during this period.

Q And in the case of the yogurt and Lite-Line milk, were these products sold to A&P and the other customers under the Borden label?

A They were.

Q Now, Mr. Bitting, in connection with the onion dip, I believe you stated that RAP Exhibit 90, page 3, referred to "dips", is that correct?

A Yes, sir.

Q It does not refer specifically to onion dip, does it, sir?

A No, it does not.

Q Now, sir, in your review of invoices to customers other than A&P, did you find any other dips other than onion dip

A Yes, as a co-op, as a co-op.

Q As a co-op?

A As a co-op.

Q Can you explain that answer?

A Well, Central Grocers advertised for us as a co-op.

Q I see.

And what media was used for advertising?

A Newspaper.

Q And how often did such advertising appear?

A Central advertised once a week.

Q Did you regularly compare your prices with those charged by your competitors, including A&P, during 1966?

MR. CURNIN: Objection, your Honor.

MR. McLAIN: Objection, your Honor.

MR. CURNIN: Unless limited to milk and dairy products, I don't know that we are interested here in a general comparison of all items shopped in his store, or in competitive stores.

MR. McLAIN: Same objection, your Honor.

MR. PALEWICZ: Your Honor, this question, I believe, had been gone into already several times, and I think what we are doing is going into the market area on a very limited basis.

The man is the owner of the store, and he is explaining how he ran his business, how he --

JUDGE HINKES: But are we interested in whether he checked the prices of anything other than milk or milk products?

MR. PALEWICZ: Your Honor, we are also interested in competition with A&P in the, with the grocery business in this particular area at this time

JUDGE HINKES: Well, I will allow the witness to answer this question, but I don't think we ought to go into it in any length.

MR. PALEWICZ: I just have one other question on this.

JUDGE HINKES: Very well.

MR. CURNIN: May we have the question repeated for the witness, your Honor?

JUDGE HINKES: Yes.

(Question read.)

THE WITNESS: I checked prices.

By Mr. Palewicz:

Q How did you do this?

A I would go into the stores.

Q Was this also the A&P Stores?

A I checked several stores.

Q When you made these comparisons, Mr. Cox, did they include prices on milk and milk products?

A Yes.

Q Why did you compare your prices?

A So we can stay competitive. I had three chains in our area.

Q To the best of your knowledge, can you ever recall A&P, during the period in issue, leading off on a price reduction in milk in your market area?

A No.

Q In the conduct of your business, Mr. Cox, how important is the purchase price to your company with relation to your ability to compete?

MR. CURNIN: Objection, your Honor, unless limited to milk and dairy products.

MR. McLAIN: Same objection, your Honor.

MR. CURNIN: Here again, your Honor, we are getting into, it looks to me, to be a broad sweeping review of the pricing and purchasing of a whole variety of items which are unrelated to the items in the case, which are limited to milk and dairy products.

JUDGE HINKES: Well, I do think that one of the elements of this case, as has been already explained, is the profit margin that exists in the grocery business, part of which is involved by the purchase and sale of milk, and so that we can understand the impact of the milk cost and selling price, it is necessary to have

MR. CURNIN: Well, my objection is, your Honor, that we will not find it out by this particular inquiry.

JUDGE HINKES: No. I will overrule the objection.

The witness will answer.

MR. PALEWICZ: Repeat the question, please.

(Question read.)

THE WITNESS: I am sorry, I don't understand what you mean.

By Mr. Palewicz:

Q Let's take this in the conduct of your business, Mr. Cox; how important are costs to you for grocery products?

A They are very important.

Q And why is this important?

A Well, it's a matter of profit and loss.

Q Do you consider discounts or rebates of one or two percent on any product to be important?

A Yes.

MR. CURNIN: Continuing objection, your Honor, to this line, which is unrelated to milk and dairy products.

JUDGE HINKES: You may have a continuing objection.

MR. McLAIN: Same objection, your Honor.

By Mr. Palewicz:

Q Why do you consider this important?

A I am lost. I am completely lost. You are going to have to back up.

Q Do you want me to repeat --

A I would say so.

MR. PALEWICZ: Would you read the last questio please, and answer.

(Question and answer read, and the pending question was read.)

MR. CURWIN: Your Honor, I believe this is cumulative. The witness has already testified --

JUDGE HINKES: No, not yet.

You may answer.

THE WITNESS: Why do I consider it important?

By Mr. Palewicz:

Q Discounts of one or two percent on any product to be important.

A Well, it's more profit. It pays your bills.

Q Mr. Cox, how important is milk to your store's operation?

A It was an important factor.

Q Can you explain that answer, by "an important factor," what do you mean?

A Well, it was a certain amount of our business. Percentage-wise I can't say -- probably ten, between ten and fifteen percent.

Q Mr. Cox, are discounts and rebates on milk and milk products important to your operation?

A Yes.

Q Why are they important?

A Well, it's based on your volume; the more you sell, the bigger the profit.

Q Now, when you say it's based on your volume, the more you sell the bigger the profit, what do you mean? Can you explain that further?

A Well, I would say the larger the rebate.

Q From the supplier?

A Yes.

Q During the period 1966, were you familiar with your store's milk and milk products purchasing practices?

A Yes.

Q Did you do the purchasing during this period?

A Yes.

Q How were you billed by Borden on milk and milk products during 1966?

A Daily.

Q Who did you pay?

A The milkman.

Q Was that -- by the "milkman," do you mean the driv

A Yes.

Q During the period 1966, did you receive any rebate or discounts from Borden off the invoice price of milk and milk products?

A I received a rebate once a month.

Q You did receive a rebate?

A Yes, once a month.

Q Once a month.

Do you have any idea how the rebate was calculated?

A It was based on your, the amount of milk you sold. I got 23 percent rebate on everything I sold except if it was a sale item.

Q And how was the rebate paid to you?

A By check.

Q When would a rebate for a particular month be paid to you?

A About two weeks, or fifteen or twenty days later.

Q Would that be after the month, total month's purchases?

A Yes.

Q Did you receive more than one rebate check per month on milk and milk products from the Borden Company

A No.

Q Did you also purchase ice cream from Borden?

A Yes.

Q Mr. Cox, did you receive, during the period 1966, any loans from the Borden Company?

A No.

Q Did you receive any equipment during 1966 in connection with your purchases of milk and milk products from the Borden Company?

A Not to my knowledge.

Q During the period 1966 did you receive any promotional aids from Borden?

A Yes.

Q And what kind of promotional aids did you receive?

A I would say window signs, which you can feature the merchandise.

Q And how often did you receive these promotional aids?

A I couldn't tell you, but it was whenever they had a sale.

Q During the period 1966, Mr. Cox, did you ever receive any promotional allowances?

A Yes, I would say so.

Q And how were these promotional allowances paid to you?

A They would be taken off the bill.

Q They would be taken off the bill; what do you mean by that, sir?

A Well, if they give you a sale item they would reduce the price off of your invoice.

Q Mr. Cox, did you pay your Borden bills promptly during the period 1966?

A Yes.

Q To the best of your knowledge, was your credit rating with the Borden Company good?

A Yes.

Q To the best of your knowledge were there any added expenses of collection from you?

A No.

MR. PALEWICZ: Mark for identification Commission Exhibits 184-M through 184-R, and 184-T through 184-Z, which consists of U.S. individual tax returns for James R. and Ruth S. Cox, for the periods 1966 and 1965, respectively.

(The papers referred to were marked Commission's Exhibits 184-M through 184-R and 184-T through 184-Z for identification.)

By Mr. Palewicz:

Q Mr. Cox, I hand these to you and ask you to familiarize yourself with these documents.

MR. CURNIN: May we see the documents at this

Q 'Six days.

As of January '66, how long had you been in operation at the location which you gave for Jim's Grocery?

A About three years.

Q So that you opened up the store in 1966 -- I mean, 1963, excuse me.

A Yes.

Q Was it an existing store at that time which you took over, or did you go in and equip it and start up with a new business?

A It was an existing store.

Q Did you purchase it from the prior owner?

A Yes.

Q And who was that owner's supplier of milk and dairy products?

A Borden.

Q In 1966 did you receive special deliveries from Borden on milk and dairy products?

A Just regular deliveries.

Q On occasion, as best you can recall, now, in 1966, did you ever run out of milk and dairy products and ask for additional products to be delivered to the store?

A I don't recall, but it is possible.

Q And if you did need additional products, you could

3rh2 get special deliveries from the Borden Company?

Q A   Yes. Yes.

Q   Did you pre-order, or did the Borden driver make up your order when he arrived at the store?

A   The driver made out the order.

Q   And during the year 1966, were you ever visited by a Borden salesman or representative?

A   Yes.

Q   And how often would he visit you?

Q A   Oh, it all depends. I can't say. Maybe once a week, maybe once a month.

Q   And he would review with you any problems you might be having?

Q A   (Nodding head.)

Q   Or -- and/or any promotions that might be in progress or forthcoming?

Q A   Yes.

Q   And would he, at that time, deliver promotional material or other aids to you for use in your store in connection with your sales of Borden products?

A   I would say yes. Yes.

Q   In the year 1966, did the Borden Company run the risk of spoilage?

A   Yes.

Q Q   Did -- you testified that you were billed daily by the Borden Company in 1966.

Did you pay by cash or by check?

A Both.

Q Both.

A (Nodding head.)

Q And this daily billing, that would be something that the driver would make up and he would present to you; you would review the billing and then give him the payment in cash or in check?

A Yes.

Q Or was that handled by your wife, who was taking care of the books and records?

A I doesn't matter; if one of us paid, I can't say which one.

Q One of them would pay after review of the bill?

A If we weren't there the help would pay for it.

Q You testified this morning that during the year 1966 you received promotional allowances from the Borden Company; would that have been on dairy products?

A Yes.

Q And were dairy products an important part of your business?

A Yes.

Q And how often were these promotional allowances made available to you from the Borden Company?

h4

A I can't say for sure.

Q Did the Borden Company regularly promote the sale of dairy products throughout the year?

A I would say yes.

Q Almost on a weekly basis?

A Not quite that frequently.

Q Bi-weekly?

A Yes, probably maybe every other week.

Q And these were important in the operation of your store?

A Yes.

Q And would you receive promotional aids in connection with those sales, window signs or point-of-sale signs?

A Yes.

Q You testified that you received no equipment from the Borden Company in 1966.

Had you received equipment from the Borden Company at any time prior to 1966?

A No.

Q Can you recall for us, sir, what you mark-up was on milk and dairy products in 1966?

A I can't.

Q Therefore you are unable to tell us how it compares with your mark-up on other items carried in the store?

A There is no way I could, I know.

Q At this time?

A No.

Q You testified that there were three chains operating in your area in 1966, Jewel, National Tea and A&P?

A (Nodding head.)

Q How would you rank A&P in the order of competition with these two chains?

A Have to be third.

Q And who is first?

A Jewel.

Q And then National Tea?

A Yes.

Q And then A&P?

A I would say so.

Q How does A&P -- or did A&P rank with Grocerland?

A Well, just better known that's all I could tell you.

Q But the Grocerland store was a more competitive store?

A Well, it was closer.

Q Right, and more competitive?

A I would have to say so. It's closer.

Q Did you, at any time in 1965 or '66, receive offers from other dairies operating in your area to supply you with milk and dairy products?

A It's possible.

Q Can you recall for us, sir, the dairies that approached you in 1965 and offered to sell you milk and dairy products?

A I don't imagine I can. I can't tell you the name. I don't know if they would be out there.

Q Can you recall for us the names of the dairies that contacted you in 1966?

A I can't say for sure.

Q That is because of the passage of time, you can't now recall what happened in '65 and '66?

A Well, that's right. There is no way I can tell you offhand exactly who come in.

Q And can you tell us ~~where~~ whether or not any of the dairies that contacted you in 1965 offered you a price that was equal or comparable to the price you were then paying the Borden Company?

A I would say it would probably be the same, because I didn't switch milk.

Q Would the same have been true in, for those dairies that contacted you in 1966?

A Yes, I suppose.

Q Do you recall now whether or not any of the dairies that contacted you in 1965 or 1966 offered you a better overall price, or a better overall deal than you were then receiving from the Borden Company?

A I can't say.

Q What dairies were supplying stores in your area in 1965 and 1966?

A Oh, several.

Q Will you name them for me, sir?

A Wanzer, Hedlin's, Spinney Run, Hawthorn-Mellody, Dea That's the leaders, I think.

Q When you say --

A Plus Borden.

Q Plus Borden?

A Yes.

Q When you say Wanzer, Hedlin's, Spinney Run, Dean and Hawthorn-Mellody were the leaders, do you mean by that sir, that they were popular brands in your area?

A Well, they were in our area.

Q And to your knowledge were they popular brands of milk?

A I do think so; they are well known.

Q When you made these price comparisons in 1966, did you maintain any record of these price comparisons?

A No.

Q Were you ever advised by a Borden representative in 1966 that you could receive a greater discount if you did the pre-ordering?

A I don't recall it.

Q Do you recall any conversation with the Borden representative at which you were advised that you would receive a greater discount if you assumed the risk of spoilage of milk and dairy products in your store?

A I don't recall.

Q Did your store have any parking, Mr. Cox, in 1966?

A No.

Q The Centrella Co-operative, did it offer a milk program to its milk customers?

A If you wanted it.

Q And would you explain to us what that program was, sir?

A Well, it was just a different company.

Q What company?

A Dean.

Q Dean milk?

A I am not even sure that was in 1969 or '66. It could have been later, because I really wasn't interested at the time.

Q Do you recall any of the terms under which you could purchase Dean milk through the co-operative?

A No.

Q I believe that you may have covered this already, but was it your testimony that in 1966 you priced your milk and milk products competitively?

A Yes.

Q You testified that, I believe that there were two A&P stores near you.

Did you compete with both stores, or only one?

A I can't say I competed.

Q You can't say you competed with either one of them?

A I won't say for sure I competed with either one, no. They were in the area, that's all.

Q Right.

Did A&P's sale of private label milk and dairy products in 1966 injure your business?

A They didn't have their private label.

Q In 1966?

A I don't think so.

Q In any event you don't recall their having private label in 1966?

A No, sir.

Q Did you have a walk-in cooler or something similar to that in your store in 1966, Mr. Cox?

A No, sir.

Q You had a dairy case?

A Yes.

Q And the Borden driver, would he, when he delivered

h12

records of your retail prices for the year 1966 -- did you have?

MR. CURNIN: Asked and answered, your Honor.

JUDGE HINKES: Yes, I believe the witness was asked.

THE WITNESS: Yes, I was.

No.

JUDGE HINKES: Had any records and he said he didn't have any out-of-store price records.

MR. MATHIAS: I think this question, your Honor, was did he have any in 1966.

JUDGE HINKES: Oh, I see.

Did you have those -- did you have such records in 1966, Mr. Cox?

THE WITNESS: No, I have no -- in my mind I probably had them, but I didn't have them written down.

JUDGE HINKES: No written records?

THE WITNESS: No.

JUDGE HINKES: All right.

By Mr. Palewicz:

Q In response to Mr. Curnin's questions, Mr. Cox, you stated that Borden was responsible for spoilage during the period 1966.

Now, going back to this period, 1966, how much out-of-date Borden merchandise did you have at that time?

A Very little.

Q Mr. Curnin, during the cross examination, used the term "Centrella" in one of his questions.

Is this a term that was sometimes applied to Central Grocers?

A Yes, that is their -- probably their name that they advertise by, Centrella.

MR. PALEWICZ: No more redirect, your Honor.

JUDGE HINKES: Anything else, gentlemen?

MR. CURNIN: No.

MR. McLAIN: No, your Honor.

JUDGE HINKES: Thank you, Mr. Cox.

THE WITNESS: Thank you.

JUDGE HINKES: You may step down.

(Witness excused.)

JUDGE HINKES: I think we can go off the record for a moment.

(Discussion off the record.

JUDGE HINKES: We will resume in this room at 1:00 o'clock.

(Whereupon, at 11:30 o'clock a.m., a recess was taken until 1:00 o'clock p.m., this day.)

***

Q Did A & P, to your knowledge, sometimes feature its dairy products in the advertisements?

A Yes, sir, it did.

Q Now, Mr. Gintert, I will leave that line of questioning and go into another one.

Did you regularly compare your prices with those charged by your competitors, and specifically including A & P?

A Yes, sir.

Q How did you do so?

A By making a price check either personally or with my dairy manager.

Q So either your or an employee of your store made a price check?

A Yes, sir.

Q Did you do so in any other manner that you can remember?

A Well, in -- naturally, you check the newspaper ads. Those would. . .

Q And when you made these price checks of your competitors, did this include the prices being charged for milk and dairy products?

A Yes, sir.

Q Mr. Gintert, why did you compare your prices with the prices for milk and dairy products and other products being charged by A & P and other competitors?

A Well, we were struggling for business, and we were -- wanted to be competitive in all areas.

Q Mr. Gintert, to the best of your knowledge -- and answer only if you can -- can you ever recall A & P ever leading off on a price reduction on milk?

A Not specifically, no.

Q Now, Mr. Gintert, you've testified that you -- Mr. Gintert, you were a grocery manager, and you are now President of the store, and I would like to ask you if, in your opinion, you competed with the other A & P stores which you mentioned in Gary, Indiana.

A Yes, sir.

Q What is the basis for your statement that you did compete with them? Why do you think you did?

A Well, we checked their prices and tried to be as competitive as we could on all items.

Q Now, I mean --

A And give them --

Q And you knew the same customers they did, or some of the same customers they did?

A Oh, yes, because the customers shop, you know, practically three or four stores, they don't just shop one store.

Q Now, Mr. Gintert, is the purchase price of the products which you buy for resale important to your company?

A Oh, yes.

MR. SCHAEFER: Objection, your Honor. Once again, the question is not limited to milk and dairy products, and there is no apparent relation to Count 3 of the Complaint.

MR. SOEFFING: Your Honor, again, I think we took this up yesterday. This was brought up -- this was brought up again between Mr. Curnin and Mr. Mathias. I think we're only going to have one or two questions, and what we're trying to establish, of course, is the relationship of all of the grocery items in the store to milk, and the fact that -- of discounts and how they relate to the total profit structure of the company. I don't want to go into it farther than that, because I think the witness should testify about it, not myself, but I think that that's enough about what happened yesterday.

JUDGE HINKES: I think that I would overrule the objection. In line with what I said previously, one of the initial premises was where profit margins are tight, then we are interested in knowing even 4 percent of the business and how it fares. But in order to first determine whether profit margins are tight, this question has to be answered, and so I must

By Mr. Soeffing:

Q Mr. Gintert, to give you the question again, as best I can, is the purchase price of the products which you provide for your store, or your company, important, and is it important especially in relation to your ability to compete?

A Yes, sir.

Q And why is that so?

MR. SCHAEFER: Continuing objection, your Honor.

MR. DEMBROW: Renew our objection.

JUDGE HINKES: Very well.

THE WITNESS: It enables you to be competitive, and it also enables you to be more, to give better service, keeping lower prices to your customer.

By Mr. Soeffing:

Q Do you consider discounts or rebates of one or two percent on a product to be important?

A Yes, sir.

MR. SCHAEFER: Continuing objection, your Honor.

MR. DEMBROW: Continuing objection.

JUDGE HINKES: Very well.

By Mr. Soeffing:

Q Why -- let the record show he answered "yes".

lrh2

A Yes.

Because one or two percent is quite a bit in our business.

Q Now, leaving that for a moment, Mr. Gintert, how important is milk to your operation?

A It's a very important item. It's an every-day item.

Q Are discounts and rebates on milk and dairy products important to your operation?

A Yes, sir.

Q And why is that so, sir?

A Because it's an item the housewife buys every day.

If you are competitive on milk and dairy products, you have a good chance of keeping your customers.

Q What is the -- is milk a -- how does milk move in your store?

A Very good. It's a --

Q Is it a high volume --

A It's a high volume item.

Q Do consumers come in periodically to get milk frequently?

A Oh, yes. It's usually one of the items they come in and shop for, milk and bread, that is an every-day item.

Q Would they come in for that frequently?

3

A Yes.

MR. DEMBROW: Objection.

MR. SCHAEFER: Objection to complaint counsel leading this witness.

JUDGE HINKES: Let's try to watch that.

MR. SOEFFING: Yes, sir. All right, your Honor.

By Mr. Soeffing:

Q Are consumers familiar with milk prices at your store and with other stores?

A Yes, sir.

MR. DEMBROW: Objection, your Honor; calls for the state of mind of consumers.

MR. SOEFFING: If he wishes, your Honor, I will ask him how he knows.

JUDGE HINKES: Well, --

MR. SCHAEFER: That is not our obligation, your Honor, to request --

JUDGE HINKES: Let's first find out whether he knows, and then the question.

MR. SOEFFING: All right.

By Mr. Soeffing:

Q Do you know whether customers of your store are aware of milk prices in your store, and other stores, --

A Yes.

rh34

Q -- to your personal knowledge.

How do you know, sir?

A Because if you are higher, they will tell you right away.

Q And what affect would it have on your particular business if you sold milk at a price higher than that charged by, let's say, another corporate chain in the marketplace?

A Well, you lose some of your business.

Q Mr. Gintert, are you familiar with the term "leader" as that term is used in grocery merchandising?

A Yes, sir.

Q And what does that term mean to you, as best you can define it?

A It's selling an item at a low, low mark-up to entice customers to come into your store for the exposure.

Q And is milk sometimes used as a leader in your market area?

A Yes, sir.

Q By you?

A Yes, sir.

Q Mr. Gintert, if you received a lower purchase price than a competitor of yours on milk and dairy products, what would the affect be in your operation?

MR. SCHAEFER: Objection.

MR. DEMBROW: Objection.

JUDGE HINKES: I am afraid I didn't hear the entire question.

MR. SCHAEFER: I am sorry. I thought it was finished, and I was afraid the witness was going to answer the question before the objection was interposed. I beg your pardon.

MR. SOEFFING: Reread the question for his Honor.

(Question read.)

JUDGE HINKES: Now what is the ground for the objection?

MR. DEMBROW: Objection, it's a hypothetical question with no foundation laid.

MR. SCHAEFER: And no real definition, even within the hypothetical itself.

JUDGE HINKES: The objection is overruled.

The witness may answer.

MR. SOEFFING: Thank you, your Honor.

Would you please read back the question as I phrased it for the witness?

(Question reread.)

THE WITNESS: It would enable us to be more competitive, give better service, lower prices to the lrh6

consumer.

By Mr. Soeffing:

Q If you didn't lower the price to the consumer, in what other ways might you use it?

MR. SCHAEFER: Objection, your Honor.

MR. SOEFFING: I will rephrase that.

By Mr. Soeffing:

Q If you did not lower the price to the consumer, what other ways would you use it in the operation?

MR. DEMBROW: Same objection, your Honor.

MR. SCHAEFER: Same objection.

JUDGE HINKES: Well, aren't we really exploring this a little more than advisable, Mr. Soeffing? I don't know that we have had any indication that this particular witness was enjoying any better price, and consequently his conjecture as to what would happen if he got one would be apparently irrelevant.

MR. SOEFFING: Well, your Honor, this -- let me say several things, then, in that connection.

Strike the question.

By Mr. Soeffing:

Q Mr. Gintert, -- and this is my last question in this area. That was the last question, but I will give him another question and this will be my last question in that line of questioning.

(Discussion off the record.)

(Question read.)

MR. DEMBROW: Thank you.

THE WITNESS: I don't know how they were calculated.

All I know is we got a check from Borden. I wasn't involved in the --

By Mr. Soeffing:

Q You don't know whether they were paid on a percentage basis?

A No, sir.

Q How many checks did you get a month?

A I believe it was two, two or three.

Q Would these be -- would these all be rebates?

A Well, one was a rebate; one was an interest check, and the other one was, I think, a rebate on ice cream.

Q So there were separate rebates for milk and ice cream?

A Yes, sir.

I don't -- some part of the time we didn't get rebates on ice cream, but some time we did.

Q I understand.

A I am not familiar with the date on those.

Q The ice cream rebate check that you mentioned, would that have come toward the end of the 1966 through

1374

point, Mr. Soeffing.

By Mr. Soeffing:

Q Did you receive it, say, in the last couple of years or prior to that, if you can remember?

A Probably prior.

Q And did you ever receive any promotional aid or promotional material from Borden Company during the period 1966 through 1970?

MR. DEMBROW: Can I please have that question read back again?

By Mr. Soeffing:

Q Did you ever receive any promotional materials or advertising help from Borden through the period 1966 through 1970?

A Yes, sir.

Q What kind were they?

A Just banners, flyers.

Q How often was this done?

A Just periodically. I couldn't say.

Q By "periodically" what do you mean?

A Once every two or three months. Seasonalized I would say, yes.

Q Yes.

Now, Mr. Gintert, did the Borden Company ever aid you in obtaining any loans in connection with your business?

A No, sir; not me personally.

Q I mean the Wilco Food Center.

A Yes, sir.

Q Do you know how they -- how they did that?

A No, sir.

Q Were these loans taken out from a bank?

MR. SCHAEFER: Objection, your Honor.

He already testified that he does not know how Borden did this, and it seems to me that further questioning is, by Complaint Counsel would be in the nature of leading the witness, and not appropriate.

MR. SOEFFING: Your Honor, number one, I don't think -- I think Mr. Schaefer is slightly confused. I think the loan was made to Mr. Gintert and not to Borden, and then to Mr. Gintert, so I don't think that that objection is valid.

And second of all, I don't think it's leading the witness because I think that is the kind of a question that can be answered "yes" or "no" without suggesting an answer to the witness.

Either he received a loan from the bank or he didn't receive the loan from a bank, and that can be very easily answered "yes" or "no."

Either he did or didn't. I am not leading when Dixie would be offering higher prices?

A I don't think so. I think they were very close.

Q During this period of time, '65 to '70, was Wilco a member of any cooperative organization?

A Yes.

MR. SOEFFING: Your Honor, I'm going to object, a very limited type of objection.

I think on direct we went into the period 1966 to 1970. Insofar as Mr. Dembrow covers the same ground, I think he ought to restrict himself from 1966 to 1970. I have no objection to the basic question itself.

MR. DEMBROW: I was not aware that all of --

MR. SOEFFING: Not all of them were.

MR. DEMBROW: -- Complaint Counsel's questions were limited to the period '66 to '70, but I believe that --

MR. SOEFFING: I said insofar as they cover the same period.

JUDGE HINKES: Well, in any event, since we're not sure of that, I'll allow the question, but I think it should be made more specific with respect to any differences that may have existed between '65 and '66.

MR. SOEFFING: Thank you, your Honor.

By Mr. Dembrow:

Q Mr. Gintert, during this -- I think you just stated during this period of time that Wilco was a member of a cooperative organization.

A Yes, sir.

Q Now, which cooperative organization would that be?

A Central Grocers.

Q And during -- did Central Grocers have their own brand of milk which they offered to Wilco during this period of time?

A I don't think so. I'm not sure.

Q Was there a brand of milk called Centrella Milk?

A There was. I don't know whether it covered this period of time. I know there is now.

Q I see. Do you recall, is the Centrella brand of milk more than a few years old? Is it -- well, do you recall when you first heard of this Centrella brand of milk?

A Probably three or four years ago. I'm not sure on that.

Q Do you recall whether when Centrella brand of milk first came out, if it was offered to you as a member of the cooperative?

A I'm not sure.

Q Do you recall at any time before 1970 whether Central Grocers made you aware that they had a brand of milk called Centrella that you could purchase?

MR. SOEFFING: I'm going to object to that. I think that any time before 1970 is a long time. If you could make it just a little more specific --

By Mr. Dembrow:

Q Any time between 1965 and 1970.

A I couldn't say that.

Q Did there come a time when it was offered to you, this Centrella brand?

A Yes, sir.

Q Do you recall when that was?

A No, sir.

hl

Q Do you recall what the price of Centrella was in relationship to the price you were then paying for Borden and Dixie?

A No, sir.

Q Were the prices for this Centrella brand lower than the prices you were paying for Borden and Dixie?

A I think so.

Q I am not sure whether we established a little bit earlier, Mr. Gintert, in regard -- were the prices -- I don't remember if I did ask this question, the relationship between the prices you were paying for Borden and Dixie.

MR. SOEFFING: That has been asked.

MR. DEMBROW: That has been asked.

JUDGE HINKES: Yes.

MR. SOEFFING: I think, your Honor.

JUDGE HINKES: Yes.

MR. DEMBROW: Thank you.

JUDGE HINKES: Now let's be sure we understand. You said that you were a part of this co-op of Central grocers.

Are you still a part of that co-op?

THE WITNESS: Yes, sir.

JUDGE HINKES: Has that association then lasted uninterruptedly between 1965 and 1970?

***

A (Shaking head.)

JUDGE HINKES: Your answer?

THE WITNESS: No, sir.

By Mr. Dembrow:

Q Mr. Gintert, I believe in your direct testimony this morning in regard to rebates that you received from Borden, you mentioned that you received an interest check. I believe that was the term you used?

A I think that's right.

Q Would you explain what this interest check was?

A Well, that's just in the book as interest.

Q In other words, this was a rebate that you received from Borden?

A Yes.

Q For milk and dairy products?

A Yes.

Q I believe you testified this morning that you received, during the period of time in question, '66 through '70, Wilco received one or two display cases from Borden.

A Yes.

Q Would you know the approximate size, to the best of your recollection, of these cases?

A Well, they're just the standard display case. Probably two by three, something like that, two and a half by four.

Q Would that be -- the two by three that you're referring to, what measure are you using?

A Feet, two and a half feet by three.

Q I think you also were asked some questions about a loan that Wilco received either from Borden or with Borden's assistance.

Do you recall about when this loan was received by Wilco?

A I think that was in '63 or '64. I wasn't involved in that, so I don't know of any of the details on that.

Q Do you recall -- I realize you say you don't recall the details, but if I just may, do you recall the approximate amount of this loan when it was initially received by Wilco?

A One was four thousand something. The other was $16,000.

Q Do you know when these loans were paid off?

A No, sir.

Q Do you know the period during which these loans would have been paid off; in other words, how long a period for each of these loans were?

A No, sir.

Q Do you know what the interest rate was on these loans?

4rh4

Q So you would not know what the markup of the retail price markup was --

A No, sir.

Q -- over wholesale.

Mr. Gintert, do you recall during this period of time, '66 through '70, what the most competitively priced single milk package was in terms of container size or product?

A Probably the half-gallon.

I couldn't -- that was the fastest selling item, so I would imagine that would be the --

Q Was the gallon jug a very competitive -- gallon jug of milk a very competitively priced item during that period of time?

A No, I don't think so.

Q Mr. Gintert, during this period of time there was some questions this morning about advertising.

Did you advertise, Wilco advertise homogenized milk very much?

A Very seldom.

Q Would you say that this would have been true of A&P also in terms of advertising homogenized milk?

A Right.

Q Mr. Gintert, do you recall during this period of time, '66 through '70, whether A&P introduced private-label milk and dairy products?

A I can't recall for usure.

Q Do you recall -- you say you can't recall for sure whether they did or when -- or when they did?

A Either one.

Q Are you aware at some point during this period, '66 through '70, that A&P was selling private-label milk and dairy products?

A Yes.

MR. DEMBROW: Your Honor, I am almost complete with my cross examination, and we have been going for a while.

I wonder if we might take a short recess so I can check my notes.

JUDGE HINKES: Very well.

We will take a five-minute recess.

I think that in view of the near completion of cross examination that perhaps you, Mr. Schaefer, can prepare for your cross examination, if you have any.

MR. SCHAEFER: I will do so.

JUDGE HINKES: Very well.

(Short recess.)

JUDGE HINKES: Now the hearing will be in order, and Mr. Dembrow, have you completed your --

***

the direct and cross that one of these, you called one of these rebates an interest check, but that you are unaware of what exactly that referred to; is this correct?

A That's right.

Q Were you aware, during the period of time in question, of any loan that was made by Wilco to Borden?

A (Shanking head.)

Q I believe you will have to, for the Reporter's benefit, --

A No.

Q Mr. Gintert, during each of the years from 1965 through 1970, is it correct to state that you net sales in dollar amounts increased each year?

A Yes, sir.

Q And during the same period from '65 through '70 is it correct to say that each year your gross profit increased in dollar amount?

A Yes, sir.

Q And, Mr. Gintert, is it also correct to state that during this period, '65 through '70, this five-year period, that your net profit before taxes increased more than 50 percent between 1960 -- 1965 and 1970?

A I am not sure of the exact percentages, but it did increase.

Q Yes. Is 50 percent approximate?

A I couldn't say. I don't remember the figure. You have the figures.

MR. DEMBROW: Your Honor, subject to the request to examine the documents we have referred to, we have no further cross examination at this point.

MR. SOEFFING: Your Honor --

JUDGE HINKES: Yes.

MR. SOEFFING: -- I just want to point out that the questions about the rebates on direct examination were as to the method calculated, and general questions, and I don't think we ought to have any deferred cross examination.

We didn't go into any detail on the rebates or figures, and numerous figures, calculations, and I think it's beyond the scope of direct to defer cross examination on that kind of a --

MR. DEMBROW: Your Honor -- excuse me.

Your Honor, I believe that Mr. Soeffing has incorrectly portrayed his direct examination.

I recall questions about the amounts of rebates, and whether one was larger than the other, and approximate dollar amount of various checks.

MR. SOEFFING: Your Honor, I might point

Q Following the beginning of sales of private label milk and dairy products to A&P on or about November 1, 1965, did your duties connect you in any way with the sale and distribution of the private label to A&P?

A Yes, sir. Shortly thereafter I picked up the contact with A&P.

Q In other words, shortly after this date it became your responsibility?

A It became my responsibility, yes.

Q Now, was Mr. Tarr still engaged in sales to A&P at this time in his employment?

A Yes, sir.

Q And following this period did he begin to report to you rather than the district staff?

A Yes, sir, he did.

Q Now following this period of time did you from time to time have dealings with the A&P personnel concerning the distribution and sale of private label?

MR. CURNIN: Your Honor, I am not sure what counsel means by "the distribution of private label."

JUDGE HINKES: Would you want to clarify your question?

MR. MATHIAS: Your Honor, I think "distribution" is about as clear as I can get.

JUDGE HINKES: Do you mean delivery, for example?

MR. MATHIAS: That is correct.

MR. CURNIN: You mean was this witness involved with supervising delivery of milk to A&P stores?

MR. MATHIAS: Your Honor, if the witness can answer the question, I think that is the best clarification.

JUDGE HINKES: Yes, let's have the witness answer.

MR. MATHIAS: Would the stenographer please read my question?

(The reporter read the question.)

THE WITNESS: Yes, sir.

By Mr. Mathias:

Q And did you have dealings with A&P personnel following this time concerning the pricing of the private label in sales to A&P? The wholesale prices, that is.

A Yes, our prices to A&P.

Q Now, Mr. Gose, there has been prior testimony to the effect that under the arrangement with A&P, increases in raw milk costs were to be passed onto A&P by means of a formula built into the arrangement, but that later increases in costs to Borden in the area of labor, containers, and other possible cost increases were to be negotiated.

Did you subsequent to this November 1, 1965 period become involved in negotiations with A&P concerning requests for price increases resulting from cost increases in the labor area and container costs?

A Yes, sir.

Q Do you recall, Mr. Gose, any increases in labor and container costs in the spring of 1966?

MR. CURNIN: Are these increases in such costs which were incurred by the Borden Company?

MR. MATHIAS: Yes, increases incurred by the Borden Company.

By Mr. Mathias:

Q Do you recall any such cost increases?

A Could you define the period again for me, sir?

Q Surely. The spring of 1966.

A As I recall, there were labor cost increases that took place in the spring of 1966.

Q Mr. Gose, I hand you Commission Exhibit 79 for identification and ask you to familiarize yourself with this document, sir.

Can you identify this document, sir?

A Yes, sir, I have recollection of this document.

Q You have seen this document before?

A Yes, sir.

Q By whom was it prepared, sir?

A By Mr. Malone.

Q And was it submitted to you, sir, at that time?

A Yes, sir.

Q Can you identify the handwriting or the penciled computations at the lower right-hand corner of this exhibit, sir?

A I cannot, sir.

MR. MATHIAS: Move CX-79 into evidence with the exception of the penciled computations at the lower right-hand corner.

MR. CURNIN: We would object, Your Honor.

JUDGE HINKES: On what grounds?

MR. CURNIN: There is no testimony that this document was ever submitted to A&P.

MR. MATHIAS: Your Honor, this is a portion of the internal considerations of the Borden Company and is relevant as background data to the course of negotiations between the Borden Company and A&P concerning certain cost increases which Borden incurred in the spring of 1966 and which were the subject of negotiations for some period of time thereafter involving a request for price increase on private label made by the Borden Company to A&P, and I believe that later documents will show that the greater part or all of this information was made available and passed on to A&P.

MR. CURNIN: Two comments, Your Honor. I note that complaint counsel has, I believe, unintentionally misdescribed the information which appears in this document. It is by no means limited to cost increases that were incurred by the Borden Company in the spring of 1966 and I further state that it cannot be binding on A&P as there is no testimony that this document or any of the information contained in the document was ever conveyed to A&P.

JUDGE HINKES: Well, it would appear that this document explains the operation of the agreement that was reached between A&P and Borden, at least from Borden's point of view if nothing else.

MR. CURNIN: Your Honor, excuse me. I don't see that that conclusion could be drawn from this document. There is nothing on the face of the document or in the content of this witness' testimony from which you could argue that this document sought to explain the quote that was given by Borden to A&P. It appears to be merely some computations of increases in various items of costs which were incurred by the Borden Company in 1965 and 1966, nothing more.

JUDGE HINKES: Yes, but the memo itself says it concerns selling price change, and to that extent, as I said before, at least in the mind of Borden, this affected their point of view with respect to the prices to be charged A&P. Whether it ever went into effect or not, we don't know, but only for that purpose at least it should be admitted.

MR. CURNIN: I am not even sure, Your Honor, that the document talks about Borden's view as to what should be charged A&P.

JUDGE HINKES: It says "Re: May 1966 Selling Price Change,' at the third line of the document.

MR. CURNIN: But there is no indication here that this is directed to or relates to their dealings with respondent A&P.

JUDGE HINKES: I don't know that it does.

MR. CURNIN: And the witness has not yet testified.

JUDGE HINKES: I would think, however, that complaint counsel will connect this up to demonstrate its connection with A&P in particular, rather than just a change in selling prices generally. Is that possible, Mr. Mathias?

MR. MATHIAS: Yes, sir, we will.

JUDGE HINKES: On that condition I think the document can be accepted. Is there any objection, Mr. White?

MR. WHITE: No, nothing special, Your Honor.

JUDGE HINKES: Very well. I shall receive the document subject to the condition I have stated.

(The paper referred to, heretofore marked for identification Commission Exhibit 79, was received in evidence.)

By Mr. Mathias:

Q Now, Mr. Gose, has the reading of CX-79 refreshed your recollection as to certain cost increases which had been incurred by the Borden Company prior to the date of this document which was May 25, 1966?

A I am not sure I understand that.

MR. CURNIN: Your HOnor, I am not sure that the witness has testified that he doesn't have a recollection of increases that were incurred by the Borden Company.

By Mr. Mathias:

Q Well, do you recall increases in labor costs in the spring of 1966?

A Yes, I do.

Q And do you recall that sometime earlier Borden had also incurred an increase in Purepak container costs?

MR. CURNIN: May we have that as to point in time, Your Honor?

MR. MATHIAS: Your HOnor, sometime previously.

JUDGE HINKES: Just prior to 1966 is your question?

MR. MATHIAS: Yes, sir.

JUDGE HINKES: The witness will answer.

THE WITNESS: Yes, sir.

By Mr. Mathias:

Q And do you also recall, Mr. Gose, as to whether or not Borden at about this time, the spring of 1966 or shortly earlier, had incurred an increase in Social Security tax cost?

A I don't recall that in particular.

Q Now, Mr. Gose, do you recall having been involved in negotiations with the A&P Company concerning a request by Borden for an increase in private label prices as a result of these cost increases to which you have referred?

MR. CURNIN: I object, Your Honor, to the use of the term "negotiations."

JUDGE HINKES: Well, that is up to the witness to tell us whether it is that or not. The question is entirely proper. The questioner wants to know if the witness was engaged in negotiations.

By Mr. Mathias:

Q Do you recall the question now, sir, or would you prefer it to be read?

A Do you mind?

MR. MATHIAS: May we have the question read?

(The reporter read the question.)

THE WITNESS: Yes, I do.

By Mr. Mathias:

Q And when did these negotiations start, sir?

A As I recall, I presented the price increase to A&P around May of 1966.

Q And did you personally make the approach to A&P?

A Yes, sir.

Q And who did you contact at A&P, sir?

A I contacted Mr. Elmer Schmidt.

Q And what occurred at this meeting?

JUDGE HINKES: Just a moment. When you say you presented the cost increases to Mr. Schmidt, what cost increases are you referring to now?

THE WITNESS: I submitted cost increases to Mr. Schmidt on Borden and private label milk products.

JUDGE HINKES: Yes, but what cost increases of Borden's did you submit to Mr. Schmidt?

THE WITNESS: The cost increases ---

JUDGE HINKES: Let me make it a little clearer. Did you submit to Mr. Schmidt a recitation of Borden's cost increases or a statement of A&P's cost of milk and its increase?

THE WITNESS: I submitted to A&P the increase to their existing price of private label and Borden milk at that particular time.

JUDGE HINKES: Did you include any statement of Borden's cost increases in addition to the increase in the price that was going to be charged to A&P or that was being proposed to be charged to A&P?

THE WITNESS: I submitted the document that I just read.

JUDGE HINKES: This Commission Exhibit 79 you mean?

THE WITNESS: Yes, sir.

JUDGE HINKES: You actually transmitted that to Mr. Schmidt, is that what you are saying?

THE WITNESS: Yes, sir.

JUDGE HINKES: I see. Very well. Thank you. You may continue, Mr. Mathias.

By Mr. Mathias:

Q Now, Mr. Gose, do you recall what Mr. Schmidt said to you at this meeting?

A Mr. Schmidt at my meeting with him did not acknowledge the price increase. He indicated that the matter would have to be discussed with his superiors.

Q Was this both as to the private label and to the Borden label?

A At that point, yes.

Q And what did you say to Mr. Schmidt, sir?

A As I recall, I indicated that I would wait for his reply and hopefully would hear from him soon, something of that nature.

Q And what happened next, sir?

A Shortly after my visit to Mr. Schmidt I received a telephone call from Mr. Schmidt at which time he stated that they would not accept this increase on the private lable. They would with regard to the Borden label.

Q So were the Borden label prices then increased by this amount, sir?

A To my recollection they were.

MR. CURNIN: May we know the amount of the increase, Your Honor?

By Mr. Mathias:

Q Showing you Commission Exhibit 79, was the amount the same as shown on that exhibit, sir?

MR. CURNIN: May we know, Your Honor, whether the witness has any recollection on this matter?

JUDGE HINKES: I don't know that we want to tell Mr. Mathias what questions to ask. You can cover that in your cross-examination.

MR. CURNIN: Yes, Your Honor.

THE WITNESS: To my recollection this is the increase which was passed on to A&P with regard to the Borden label.

By Mr. Mathias:

Q That is the increase indicated on CX-79?

A Yes, sir.

Q At the time you visited Mr. Schmidt, who was present at the meeting?

A Obviously I was present and I cannot recall if anyone else was present or not.

Q The only ones you can recall are yourself and Mr. Schmidt at this time?

A Yes, sir.

Q Did you report the results of your meeting to your superiors, sir?

A Yes, sir, I can.

Q Now, Mr. Gose, subsequent to the notification from Mr. Schmidt that he would accept the increase on the Borden label, but not on the private label, did you continue to negotiate with A&P for an increase in the private label prices?

A I do not recall having any further discussions in the immediate future or thereafter.

Q Well, were there any at any period thereafter, sir?

A Yes, sir, there was one other occasion later.

Q And when was this, sir?

A In the early part of 1967.

Q This was approximately a year later, sir?

A Approximately.

Q And what happened on this occasion, sir?

A A price increase was presented to Mr. Schmidt in the spring -- I would have to guess. Around March of 1967.

Q And was this related in any way to your earlier request for a price increase?

A Yes, I am sure it was related to price increases that had taken place.

Q This was the cost increases that had occurred back in 1966?

A To my best recollection, yes.

Q Now what occurred at this time? Did you meet with Mr. Schmidt at this time?

A Yes, sir.

Q This is in March of 1967?

A In that general area of time.

Q And do you recall if anyone else from Borden Company was with you at this time?

A At this particular time I couldn't say for certain if anyone was with me from Bordens.

Q And do you recall who you met with from A&P?

A I met with Mr. Elmer Schmidt.

Q Now what occurred at this meeting, sir?

A I presented Mr. Schmidt with a price increase.

Q And what was Mr. Schmidt's reaction, sir?

A I recall him indicating that he would discuss it with his associates and I don't remember him acknowledging anything other than the fact that he was going on vacation and I might have to deal with a Mr. Bob Witzke.

Q How do you spell that, sir? Is that W-i-t-z-k-e?

A That is close. That is close.

Q Did you have any subsequent dealings with Mr. Schmidt or Mr. Witzke concerning the request for a price increase?

A There was a request for a breakdown or an analysis of certain labor cost factors that were involved.

Q And what did you do at this point, sir?

A Oh, in acknowledging this request, I recall Mr. Malone preparing a rather detailed breakdown of labor changes that had taken place.

Q And was this then submitted to A&P, sir?

A As I recall, this information was made available to A&P.

Q And what occurred next then, sir?

A Shortly thereafter it was requested that we discuss the matter with Mr. Ira Bartels.

Q What was Mr. Bartel's position at that time if you know, sir?

A Mr. Bartels examined the figures that Mr. Malone had prepared. He asked certain questions regarding the labor increased involved. I recall that he raised a question with regard to container expense. What I remember.

Q And did he indicate whether or not the price increase was acceptable to A&P, sir?

A He indicated that it was as proposed not acceptable, and ultimately in the overall conversation he did indicate that an increase in the area of around two mills per point seemed reasonable, words to that effect.

Q And what was Borden's reaction to this suggestion, sir, or your reaction?

MR. CURNIN: Your Honor, instead of having indications and reactions, may we have the substance of the conversation?

JUDGE HINKES: Yes. Before we go to that though, you say that Bartels suggested this two mills instead of what?

THE WITNESS: Instead of the increase that we had submitted or put through to them.

JUDGE HINKES: And was thatincrease 3-1/3 mills approximately as noted on this Commission Exhibit 79?

THE WITNESS: Not on that report or document, Your Honor.

JUDGE HINKES: What was not on this document?

THE WITNESS: There was another---

JUDGE HINKES: No, I am only referring to the figure. Was the increase that Borden requested of Bartels the same figure that is on this document, approximately 3-1/3 mills?

THE WITNESS: As I recall, it would be approximately that figure there. I don't remember if it was exactly that figure.

JUDGE HINKES: All right.

By Mr. Mathias:

Q Mr. Gose, I hand you Commission Exhibit 161A and B, and ask you if you can identify this document, sir.

Are you familiar with this document, sir?

A Yes, sir.

Q And what is it, sir?

A This document was presented to Mr. Schmidt by me in March of 1967.

Q Now does this indicate the amount which you were seeking insofar as increased private label prices were concerned in the spring of 1967?

A Yes, sir.

Q And after Mr. Bartels stated that a two-mill price increase might be acceptable, what did you say to Mr. Bartels, sir?

A I stated that we appreciated our audience with him; that I would have to return to my office and discuss the entire matter with my superiors.

Q Who were your superiors at that time, sir?

A As I recall, at that time I discussed the matter with Mr. Dave Patterson, who was then president of our new district.

Q And he was residing in Columbus, Ohio, I believe?

A Yes, sir.

Q And what occurred next, sir?

A I received knowledgement from Mr. Patterson and we placed this increase into effect.

JUDGE HINKES: Which increase?

THE WITNESS: The approximately two mills, Your Honor.

By Mr. Mathias:

Q The increase suggested by Mr. Bartels?

A Yes, sir.

Q Now do you recall what Mr. Bartels' position of employment was with the A&P Company at this time?

A I recall him being head buyer for the Chicago unit of the A&P Company.

Q He was the superior to Mr. Schmidt?

A Yes.

Q Now, what part did Mr. Joseph Malone play in the negotiations with A&P concerning this request for a price increase?

A Mr. Malone prepared the background data for these increases and he also prepared the additional information as requested by Mr. Bartels and Mr. Malone attended the meeting with Mr. Bartels and myself. Mr. Malone was present.

Q During the course of these negotiations did you consult with Mr. Malone?

A In what regard, sir?

Q In regard to the nature of the price increase request to A&P?

A I am sure I consulted with Mr. Malone with regard to the information that Mr. Malone prepared, the labor increase cost information. I don't remember anything specific about the discussion that I can recall.

Q Now, Mr. Gose, when Borden had originally incurred these cost increases in the area of labor and container costs, did Borden pass on these cost increases in its pricing to other customers in the Chicago region?

A Yes, sir.

Q And I believe you have already stated that in the spring of 1966 you passed these cost increases on to A&P in connection with your Borden label sales to A&P Stores, is that correct, sir?

A I wasn't concentrating on that question.

MR. MATHIAS: Would you reread the question?

(The reporter read the question.)

THE WITNESS: We passed the increase on to all other store customers.

By Mr. Mathias:

Q Now in the course of your dealings with Mr. Schmidt did you inform Mr. Schmidt that these cost increases had been passed on to your other customers?

A Yes.

JUDGE HINKES: When you speak of the cost increases having been passed on to other customers, what cost increases now are you referring to? Is that the 3-1/3 mills or whatever the amount was, or is it the two mill cost increase or just what is it?

THE WITNESS: In '66 that was the three-mill increase, Your Honor.

JUDGE HINKES: And in '67 was there another cost increase passed on to your other customers in a larger amount or an additional amount?

THE WITNESS: In '67, as I recall, our cost increase didn't come until a later period during that year.

JUDGE HINKES: Well, let me try to be a little clearer. When you spoke to Mr. Schmidt in 1966, around May, you told him and showed him a cost increase of approximately 3-1/3 mills per point?

THE WITNESS: Yes, sir.

JUDGE HINKES: And if I understand your testimony, that cost increase was passed on to your other customers at that time in the form of an increased price per point to them.

THE WITNESS: Yes, sir.

JUDGE HINKES: Now then, in March 1967 you once again approached Schmidt for an increase in his private label purchases. This time you presented him, if I read Commission Exhibit 101 correctly, with a cost increase of almost 3-2/3 mills approximately, or roughly one-third of a mill larger than what you had last spoken of, and they agreed to a two-mill increase at that time. But what I want to now know is with your other customers did you then in March 1967 in view of the increase in cost that you thought you had incurred of approximately an additional one-third of a mill, did you at that time increase your price to your other customers also by that amount?

THE WITNESS: At that particular time we did not raise to our other customers.

JUDGE HINKES: I see. Very well.

By Mr. Mathias:

Q Had there been any other price increases to your other customers in the interim period between May of 1966 and March of 1967 that you can recall?

MR. CURNIN: May I have that question read?

(The reporter read the question.)

JUDGE HINKES: Thank you.

THE WITNESS: I do not recall any increases during that time.

By Mr. Mathias:

Q Is it possible that there may have been ---

MR. CURNIN: Objection, Your Honor.

JUDGE HINKES: I will sustain that.

MR. MATHIAS: Move Commission Exhibit 101A and B into evidence.

JUDGE HINKES: Is there any objection?

MR. CURNIN: No objection, Your Honor.

MR. WHITE: No, Your HOnor.

JUDGE HINKES: 101 is received.

***

witness may answer.

THE WITNESS: I don't recall this document here.

By Mr. Mathias:

Q That is 123, sir?

A I don't have recollection of it.

Q Do you recall similar discount published notices, Mr. Gose?

MR. CURNIN: Objection, Your Honor, to the use of the description "similar discount notices."

JUDGE HINKES: I would suggest, Mr. Mathias, that you point out to the witness just exactly what this document consists of -- it has been received in evidence -- and then pursue your questioning.

MR. MATHIAS: Your Honor, I think that I will just abandon the line of questioning.

JUDGE HINKES: Very well.

By Mr. Mathias:

Q Mr. Gose, are you familiar with the O'Hara routes of the Borden Company?

A Could you zero in on what aspect of the routes that you might be referring to?

Q Well, my prime interest at this moment is were they within the Chicago metropolitan region.

A Yes, they were.

Q Now, are you familiar with the Hammond branch of the Borden Company?

A I am aware of the Hamond branch.

Q What area did it serve if you know, sir?

A It served what is known as the Calumet area, certain portions of Northern Indiana. That principally was its distribution area.

Q Mr. Gose, I hand you Commission Exhibit 75Y for identification and I note a handwritten notation at the top right-hand corner which appears to be "O. ~~Goss~~ Gose," and ask you if you can identify this document, sir.

MR. CURNIN: The reference that you have to the upper right-hand corner is not clear on this document, Mr. Mathias.

MR. MATHIAS: Your Honor, one moment please.

Your Honor, the original of this document has been located and I would like to substitute it for the copy that I previously handed the witness.

JUDGE HINKES: Very well.

THE WITNESS: I don't recollect seeing this document.

By Mr. Mathias:

Q Whose writing appears in the upper right-hand corner, if you know, sir?

A I do not know.

Q Is it yours, sir?

A No, it is not, sir.

Q Mr. Gose, I now hand you Commission Exhibit 75Z-5 for identification and ask you if you can identify this document.

1:15 p.m.

AFTERNOON SESSION

JUDGE HINKES: Mr. Mathias?

MR. MATHIAS: No more direct, Your Honor.

JUDGE HINKES: Mr. White?

XX CROSS-EXAMINATION

By Mr. White:

Q Mr. Gose, did you have any internal considerations within Borden in which you participated shortly after the time that Borden started serving A&P with private label milk in the Chicago area as to offering private label at substantially the same prices that you were selling to A&P to other customers in the Chicago area?

A Yes.

Q And with whom did you have these discussions at Borden?

A As I recall, they were discussed with Mr. Minkler and with people from our legal department.

Q From the Borden Law Department?

A Yes.

Q And what were the conclusions of those discussions, can you tell us?

A The conclusions were that we were told that we should not use this price in the solicitation of other accounts because our price to A&P was a meeting of competition price.

Q Now, did you, however, discuss with other customers or potential customers in the Chicago area the possibility of supplying them with private label products?

A Yes, sir.

Q With whom did you have such a discussion, Mr. Gose?

A I recall having discussions with the buyer of the Kroger Company in Chicago.

Q And what was that person's name?

A The person's name was Mr. Arthur Blair.

Q In relationship to the time that Borden started delivering private label to A&P, approximately when did this happen?

A I called on Mr. Blair just prior to our introduction of the private label with A&P. I don't recall the exact date, but just prior to it.

Q And where did this conversation take place?

A At the Korger headquarter office in North Lake.

Q North Lake, Illinois?

A In Chicago.

Q And was there anyone present besides you and Mr. Blair?

A Not to my recollection.

Q And would you please tell us in substance what was said at that time?

MR. CURNIN: Your Honor, at this time I would like to interpose an objection in regard to this conversation with Mr. Blair and the witness's testimony as to the conversations he had with Borden personnel about offering

***

THE WITNESS: I do recall a discussion with relation to the use of the price with A&P with regard to other customers.

JUDGE HINKES: Now, do you recall what you said about it, if anything?

THE WITNESS: I don't recall specifically what I said, sir.

JUDGE HINKES: Do you recall what was said about it by anybody?

THE WITNESS: I inly recall the general conclusion to the qestion that was involved.

By Mr. Curnin:

Q What was the question, if I may, Your Honor?

JUDGE HINKES: The question is whether he recalls what anyone at the meeting said about pricing to others at A&P's level.

MR. CURNIN: No. The question that was involved. He said ---

THE WITNESS: That is the question that I am referring to, what His Honor just said.

JUDGE HINKES: Very well.

Now, there was a conclusion you said reached.

THE WITNESS: The conclusion reached was that this, the price with A&P, could not be used with other customers because the price with A&P was a competitive meeting of competition price.

JUDGE HINKES: Now, do you remember who made that conclusion?

THE WITNESS: I do not know for certain.

JUDGE HINKES: Are you sure that you didn't?

THE WITNESS: I am sure that I didn't.

JUDGE HINKES: Then presumably, if I understand your testimony, it was either Mr. Minkler or the lawyer; is that correct?

THE WITNESS: Yes, sir.

JUDGE HINKES: Now, can you tell us which one of the two it was, if you remember?

THE WITNESS: I cannot remember for certain, sir.

JUDGE HINKES: But it is your testimony that one of the two came to that conclusion?

THE WITNESS: That was the conclusion of the meeting, sir.

JUDGE HINKES: Made by one of those two?

THE WITNESS: Yes.

By Mr. Curnin:

Q Do you recall Mr. Minkler stating to you that "if anybody should ask us about this price that we are charging to A&P, that is what we are going to tell them, it is a meeting competition price"?

A I don't recall that.

***

We will wait and see. I am not going to rule it out at this stage.

You may continue.

(The witness re-entered the Courtroom.)

JUDGE HINKES: Theobjection has been overruled.

You may continue, Mr. White.

By Mr. White:

Q Mr. Gose, just before you were excused, while Counsel took up certain objections before the Judge, I had askedyou to tell us the substance of your conversation with Mr. Blair at Kroger that you had just referred to.

Will you please do so?

A In substance I informed Mr. Blair that in the near future we would be packaging a private label product for one of our major customers.

I also requested the opportunity to, in the near future, present a private label program to him.

Q What, if anything, did Mr. Blair say?

A As I recall, Mr. Blair was appreciative of the information I gave him and indicated at that first time that I visited him that it was something that could be discussed at a later date.

MR. CURNIN: Your Honor, may we have the date of this conversation, the approximate time?

THE WITNESS: I could not give you the exact date but it was prior to our actually putting A&P's private label out on the street.

By Mr. White:

Q In other words, assuming that that occurred on or about November 1, 1965, this conversation with Mr. Blair was shortly prior to that?

A Yes.

Q All right.

Now, did you see Mr. Blair again?

A Later. I don't know the exact date.

Q Would it have been in December of '65 or January of '66?

A I am sure it was in January, in early '66.

Q And at this second conference with Mr. Blair, was there anyone present besides you and Mr. Blair?

A No one to my recollection.

Q And where did this second conference take place?

A At the Kroger office in North Lake, Illinois.

Q Will you please tell us the substance of that conversation?

A The substance of that conversation, Mr. Blair indicated that at that time they had absolutely no interest in a private label Kroger milk program in Chicago.

Q How many stores approximately did Kroger have at that time in Chicago?

A Approximately 60-some.

Q Now, was there any discussion at that time about the sale of Borden brand products to Kroger for the Chicago stores?

A Yes, I discussed the posibility of presenting a Borden program to Mr. Blair and ~~even~~ he acknowledged that I could do so.

Q Who was supplying Kroger for its Chicago stores with milk and milk products at that time?

A The Bowman Dairy Company.

Q Now, did you subsequently submit a proposal to Mr. Blair for the Borden brand?

A Yes, I did.

Q And about how long after this early January '66 meeting would this have taken place?

A I do not know the exact date but I would say in the first half of 1966.

Q And can you tell me approximately the pice level at which these prices were that you quoted on the Borden label?

JUDGE HINKES: Of the Borden label?

MR. WHITE: On the Borden label, yes, sir.

THEWITNESS: I do not recall the actual list prices in effect that time, but our discount, our top rebate at that time was 30 percent and as I recall this proposal was slightly better than what our discount was in existence because I do remember Mr. Malone giving recognition to the added volume, the effect of the added volume, that would be reflected in obtaining this business.

By Mr. White:

Q Now, after you made this proposal to Mr. Blair, what, if anything, did he say in response to it?

MR. CURNIN: May I have that question read?

(The reporter read from her notes as requested.)

MR. CURNIN: Not to interrupt Mr. White's examination, may we note a continuing objection to these conversations?

JUDGE HINKES: Very well. Your objection is noted.

MR. WHITE: Would you like the question read again?

THE WITNESS: I thought I answered it but --

MR. WHITE: No, you didn't.

THE WITNESS: -- but if there is one pending, yes.

(The reporter read from her notes as requested.)

JUDGE HINKES: That is the proposal on the Borden label; is that correct, Mr. White?

MR. WHITE: Yes, sir.

THE WITNESS: At my next meeting with Mr. Blair Mr. Blair indicated that the quote that we made was over $100,000 excessive of their present cost for milk products.

By Mr. White:

Q Now, when you say "over $100,000", did Mr. Blair explain that? Was that on an annualized basis or did he simply say that?

A That was based on taking our price quotation as against their current volume levels as compared to the same volume levels with the price that they were currently paying.

Q And this conversation where he told you this, was it shortly after you had made the submission of the Borden proposal on the Borden label to him?

A Yes, I remember that he got back to me quite soon after I had submitted the proposal to him.

Q I think we have covered this but I want to make sure.

Going back to your meeting with Mr. Blair in January, do I correctly understand that at that meeting ~~the~~ he told you that Kroger was not interested in a private label for its Chicago stores?

A That is correct.

Q Mr. Gose, I hand you a document which has been makred RBX1-A through 1-J for identification.

(The document referred to as RBX1-A through 1-J was marked for identification.)

By Mr. White:

Q Can you tell me what that document is, sir?

MR. MATHIAS: Your Honor, I wonder if Complaint

Counsel could be given the oportunity to read the document because it is the first we have seen it, prior to any question.

JUDGE HINKES: Very well.

Just hold your question, if you will, Mr. White.

MR. MATHIAS: Your Honor, we have had a chance to read it now.

JUDGE HINKES: You may proceed.

By Mr. White:

Q What is this document?

A This is a price proposal or a proposal for a private label milk program to Mr. A. L. Shough for their Chicago unit stores.

Q And who is Mr. A. L. Shough?

A Mr. Shough was a gentleman who headed up the Dairy Department for the Kroger Company at the corporate office or at the headquarter office in Cincinnati.

Q And was this proposal transmitted to Mr. Shough?

A Yes, it was.

MR. WHITE: I offer RBX1-A through 1-J, Your Honor.

JUDGE HINKES: Is there any objection?

MR. MATHIAS: No objection.

MR. CURNIN: Continuing objection for A&P, Your Honor.

JUDGE HINKES: Very well. The objection is overruled and this document is received in evidence.

(The document heretofore marked RBX1-A through 1-U for identification was received into evidence.)

By Mr. White:

Q Mr. Gose, was the offer covered by RBX1 accepted by Kroger?

A No, it was not.

Q Mr. Gose, I show you what has been marked ~~RBS2-A~~ RBX2-A through 2-N.

(Thedocument referred to as RBX2-A through 2-N was marked for identification.)

MR. MATHIAS: Again, may we have a chance to read it before questions are asked?

JUDGE HINKES: Very well.

MR. MATHIAS: We have read it now, sir.

By Mr. White:

Q Mr. Gose, what is RBX2?

A This is a proposal to Mr. Shough for private label milk program in Chicago.

Q For the Kroger stores?

A For the Kroger Chicago unit.

Q Now, was that proposal transmitted to Kroger or shortly after the date that the document bears, to the best of your recollection?

MR. MATHIAS: Your Honor, could I have the question

***

A Yes.

Q And was there anyone present at that conversation other than yourself and Mr. Gromer?

A Not to my recollection.

Q What was the substance of that conversation?

A Mr. Gromer stated that our proposal was not sufficiently attractive for him to make a change in his milk products.

Q And who was supplying the Gromer stores at that time?

A To my recollection, it was the Dean Milk Products that were in the store.

Q I take it that Borden did not secure the business of the Gromer Supermarkets based on this proposal?

A We did not secure the business.

MR. WHITE: I offer at this time RBX4-A through J, except for the handwriting appearing on Subpart H.

MR. MATHIAS: No objection, Your Honor.

MR. CURWIN: Same objection, Your Honor.

JUDGE HINKES: I will receive Respondent Borden's Exhibit 4 in evidence.

XXXXXXX (The document heretofore marked RBX4-A through 4-J for identification was received into evidence.)

By Mr. White:

Q Mr. Gose, I hand you a document which has been marked RBX5-A through W for identification and ask you first to turn to Subpart E.

***

***

Q This would have been a high-volume item?

A Yes, sir.

JUDGE HINKES: Would you like to have a recess at this time?

MR. WHITE: Could we?

JUDGE HINKES: Very well. We will take a short recess.

(A brief recess was held.)

JUDGE HINKES: Mr. White?

MR. WHITE: Mr. Gose, I have shown you this afternoon five proposals submitted by Borden which you have identified.

Are those the only sales solicitations that were made during the period November 1, 1965 to the time you left the employ of Borden?

MR. MATHIAS: Your Honor, I think that question is rather vague.

JUDGE HINKES: In what way?

MR. MATHIAS: Your Honor, sales solicitation -- I don't understand the term "sales solicitation".

MR. WHITE: I will rephrase the question, if that will help.

JUDGE HINKES: Very well.

By Mr. White:

Q Aside from the five proposals you have identified, Mr.

Gose, during the period November 1, 1965 until you left the employ of Borden near the end of 1963, did you and your sales staff solicit other wholesale customers in the Chicago area to sell them milk and milk products?

A Yes, sir.

Q Were you doing this constantly? You and your staff?

A Yes; our sales people were constantly doing this.

Q Mr. Gose, I show you what has been received in evidence as Commission Exhibit 138.

A Yes, sir.

Q With respect to the Chicago metropolitan region to which that document relates, was Borden also allowing a central billing discount?

A Yes, sir.

Q And how much was that?

A Two percent.

Q And that continued on subsequent to January 1, 1966?

A Yes, sir.

Q Until you left?

A Yes, sir.

Q Mr. Gose, at any time during the negotiations with A&P concerning private label milk for its Chicago stores, or at any time subsequent thereto, did you ever discuss with any A&P representative the price at which A&P would or intended to sell private label products out of stores?

***

November, December 1965?

A I do not.

Q I believe you testified, Mr. Gose, that it was during the first half of 1966 that you submitted a quota on private label milk to Kroger, and specifically a Mr. Blair.

A Yes, sir.

Q I may have misspoke myself, Mr. Gose. Let me state: was that proposal made on brand label, Borden brand label, and not on private label?

A I am very sorry. Would you repeat the question?

Q Was it your testimony that it was some time during the first half of 1966 that you submitted a quote on the Borden brand to Mr. Blair at Kroger?

A Yes, sir.

Q And the price you quoted, was that better than the price that A&P was paying for Borden brand label milk at that time?

A I don't recall.

Q What is your best recollection?

A It could have been.

MR. MATHIAS: Your Honor, I believe that answer is too speculative and I think it should be stricken.

JUDGE HINKES: You are saying it could have been and it could not have been? Is that what you mean?

MR. CURRIN: Let me ask him a few questions, if I may, Your Honor.

JUDGE HINKES: I will strike the previous answer of the witness.

By Mr. Curnin:

Q Did you have any discussions with anyone within the Borden Company about the quote that was to be submitted to Kroger on Borden brand label prior to your submitting it to Kroger during the first half of 1966?

A I am sure I did.

Q You didn't prepare the quote? It was Mr. Malone who prepared the numbers, worked up the calculations?

A Yes.

Q Do you remember discussing with Mr. Malone the fact that the price that was being offered to Kroger at this time was better than the price A&P was paying for Borden brand label milk?

A I don't recall any specific discussion with regard to that qestion.

Q Do you have today a general recollection that the price in fact was better than A&P was paying?

MR. MATHIAS: Your Honor, I object. The witness has already stated he did not have any such recollection.

MR. CURNIN: I don't believe that is his testimony, Your Honor and I believe I have a right to probe this point.

JUDGE HINKES: Let's have the witness' last answer read.

(The reporter read from her notes as requested.)

MR. CURNIN: Although he may not recall a specific discussion, Your Honor, he may nevertheless have a general recollection on the subject and that is what I am asking him about now.

JUDGE HINKES: I will allow it.

You may answer.

THE WITNESS: As I recall, Mr. Malone gave recognition to the additional volume that would be obtained if we were to secure the Kroger business and I do recall that recognition was given to that in the proposal that was prepared for Kroger.

By Mr. Curnin:

Q And by doing so he developed a better price for Kroger on Borden brand label than A&P was then paying?

A Yes, sir.

Q You testified, sir, that Mr. Blair informed you that in words of substance he wasn't going to accept your proposal because it was $100,000 in excess of what they were then paying Dean for its brand label milk -- or was it Bowman, sir?

A I don't recall anything other than more than he was currently paying.

Q More than he was currently paying to whom?

A I don't recall that he said.

Q Do you know what dairy was supplying Kroger during the first half of 1966?

A To my recollection it was the Bowman Dairy Company.

Q And that figure of $100,000, was that an annual figure?

A That was on an annualized basis.

Q Did you offer to reduce your price that you had quoted to Kroger when Mr. Blair told you this?

A I do not recall ever doing anything like that.

Q Now, during this period, 1966, the first half of 1966, you were in contact with representatives of the AP Company?

A Yes, sir.

Q As a result of your conversation with Mr. Blair, did you ever disclose to anyone at A&P at least in regard to one supplier and one competitor that the price you were charging was not competitive and that therefore you would reduce the price being charged A&P on brand label milk?

A No.

Q There has been marked as REX1 the July 29, 1968 proposal which was made to the Kroger Company which you, I believe, have testified was not accepted by Kroger.

JUDGE HENNES: What date did he mention?

MR. CURREN: July 29, 1968, Your Honor.

MR. WHITE: Would you like to see it?

THE WITNESS: If it is permissible, Your Honor.

MR. CURNIN: If, during the course of my questioning, Mr. Gose, you wish to refer to any document that has been marked in evidence, please let me know.

THE WITNESS: Could you restate your question, sir?

MR. CURNIN: Will you read the question back, please?

(The reporter read from her notes as requested.)

By Mr. Curnin:

Q Is that correct, Mr. Gose?

A That is correct.

Q Did you have a discussion with Kroger at which they told you the reasons why they were not accepting this proposal of July 29, 1968?

A There was a discussion and as I recall Mr. Shough indicated that certain products because of his knowledge of the milk production business that looked unreasonably high to him,

Q Were these products homogenized milk products? Or the byproducts?

A I don't remember them specifically but they were very definitely in the byproducts category.

Q Was he saying to you in words of substance then that your price is all right on the homogenized milk but it is too high on the byproducts?

A Would that be a hypothetical question that I can't answer?

Q No, I hope it is a factual question that you can answer.

Would you repeat the question, please?

(The reporter read from her notes as requested.)

THE WITNESS: It could be assumed.

By Mr. Curnin:

Q And what ---

JUDGE HINKES: Just a moment. What could be assume?

By Mr. Curnin:

Q Was that your understanding of what this gentleman from Kroger was saying to you?

A I would like to repeat that the byproducts he indicated were unrealistically high.

Q Unrealistically high, did you say, sir?

JUDGE HINKES: Did he offer any objections to the price for homogenized milk?

THE WITNESS: He did not at that time.

By Mr. Curnin:

Q But he raised objections to the price you were quoting on the byproducts because in his opinion they were unreasonably high?

A They were too high.

Q And was Kroger buying supplied by Dean at this time?

A Yes, they were.

Q To the best of your knowledge, Mr. Gose, wasthe price that is quoted in RBX1 for private label, was that price comparable to what A&P was paying for private label at this time in July of 1968?

A I would say it was comparable.

Q Now, after your discussion with theKroger representative and some months thereafter, you submitted to them a second proposal dated October 24, 1968, which has been marked here as RBX2-A, which I now showyou.

Did Borden in that quote improve the price on private label milk and byproducts from that which appeared in RBX1 on the byproducts in light of Kroger's statement to you that they were too high?

Let me give you two examples, Mr. Gose, and this might speed things up for us.

I direct your attention to RBX1, page C, and the item "cottage cheese" in both the 16 and 32 ounces, and at the same time I direct your attention to RBX2, page H.

Do you have those pages, sir?

A I am not with you, sir.

Q Mr. Gose, as you look at these exhibits, it is true that RBX1, page C, which I directed you to, and RBX2, page J, have different delivery requirements?

One is five-day and one is six-day.

A Yes, sir.

Q So that in that sense they would not be totally comparable; is that correct?

A It would be very difficult to compare the two schedules because of that reason.

Q Was it your understanding in submitting to Kroger RBX2, to lower the price on the byproducts so as to overcome the objection that they had raised at the time you submitted RBX1 back in July?

A As I recall that adjustment was made.

Q I note that RBX2, which is the October '68 quote to Kroger, affords then two pricing schedules or affords them an option.

One is a price based upon Borden dock pick-up, which I assume that they pick theproduct up at Borden's Woodstock, Illinois plant and the other is a more conventional drop delivery to the stores; is that not so?

A That is true.

Q Was A&P offered a similar option at this time in October of 1966?

In other words, so they could have a private label price, one based on dropped shipment, or if they so chose, one based on dock pick-up?

A To my recollection, they were not.

Q And had they been, would there have been a substantial saving in the cost, at least in the wholesale price?

Do you understand that question, Mr. Gose?

A I am not sure that I understand it.

Q I withdraw it.

The figures are in the exhibit.

Did Borden undertake a cost study at the time and prior to its submission of RBX2 to Kroger, to your knowledge?

A I cannot answerthat question.

Q Is it that you don't know, sir, or you don't now recall?

A I don't recall.

Q So then you don't know whether or not the price that was offered to Kroger in fact encompasses all the cost savings that may have been available to a customer such as Kroger at this time?

A I could not answer that.

Q Is it your testimony, Mr. Gose, that you were unsuccessful in selling private label to Kroger even with the quote which you gave them in October of '68, RBX2?

A That is correct. To my knowledge, the business was not secured.

Q Do you know why?

A I do not know why.

Q And did White Hen Pantry reject the private label proposal which you submitted to them in March of '63, which proposal has been marked as REX3?

A Yes, they did.

Q And the price that was offered to White Hen Pantry for private label on the half-gallon, was that comparable to the price A&P was paying at that time?

A I don't recall.

Q Why did they reject your proposal here on private label?

JUDGE HINKES: If you know.

By Mr. Curnin:

Q If you know, sir.

A I do not know.

Q Did anyone report to you -- Mr. Dischner or anyone else in the Borden organization -- thatthe price was rejected because it was too high or that White Hen Pantry didn't think savings permitted switching to private label?

MR. MATHIAS: Your Honor, which question is he asking the witness?

MR. CURNIN: I will ask them one at a time, Your Honor.

By Mr. Curnin:

Q Were you informed by Mr. Dischner or any other representative of the Borden Company that White Hen Pantry had rejected this offer because the price was too high?

A I don't recall.

Q You don't recall being informed of the reason why they rejected the offer?

A That is correct.

Q And the Borden Company was unsuccessful in its private label quote to Gromer Fine Foods, which has been identified as R3X4; is that not so?

A That is correct, sir.

Q Did they actually tell you why they rejected this proposal?

A Yes, sir.

Q What did they tell you?

A The prices were not sufficiently attractive to warrant making a change.

Q And to your knowledge was the price quoted to Gromer on half gallon private label comparable to what A&P was paying at this time?

A I could not answer that.

Q Was Dean supplying Gromer at this time?

A The Dean product was in the Gromer stores at that time.

Q And how many stores did Mr. Gromer have?

A As I recall, approximately five stores.

Q In September of '68 you testified you submitted a private label proposal to Eagle and that proposal has been identified as RBX5 and that this proposal was accepted by Eagle.

Was the price quoted on private label to Eagle comparable to that which A&P was paying at this time for printe label?

JUDGE HINKES: Private label?

MR. CURNIN: Private label.

THE WITNESS: I would say that the price was comparable.

JUDGE HINKES: Is that for the Borden label milk that you were quoting your price to Eagle?

MR. CURNIN: No, YOur Honor. This is on private label.

THE WITNESS: It was on private label, Your Honor.

MR. CURNIN: May we go off the record, Your Honor?

JUDGE CURNIN: Off the record.

(Discussion off the record.)

JUDGE HINKES: Let's go back, again.

The proposal that White Hen rejected, was that on private label or on the Borden label?

MR. WHITE: May he see thedocument? It is all in evidence, Your Honor.

JUDGE HINKES: Oh. I guess, then, I don't have to trouble the witness.

MR. CURNIN: That is RX3, Your Honor.

JUDGE HINKES: Very well.

***

time, sir. ***

JUDGE HINKES: The White Hen proposal, around March of 1968?

THE WITNESS: I believe so.

JUDGE HINKES: And the Kroger proposal in July and October of 1968?

THE WITNESS: The Kroger, sir?

JUDGE HINKES: Yes.

THE WITNESS: Yes, sir.

JUDGE HINKES: Now, the Kroger proposals were on private label at that time; is that right?

THE WITNESS: Yes, sir.

JUDGE HINKES: What was the proposal that you talked with them about in 1965 before the A&P deal went through?

I believe you testified that you spoke to Mr. Blair and that was about private label, was it not?

THE WITNESS: As I recall.

JUDGE HINKES: Telling him of your intentions to go ahead with theprivate label business?

THE WITNESS: Yes, sir.

JUDGE HINKES: And if I am correct you testified that Mr. Blair said, "not now; maybe later," or words to that effect?

THE WITNESS: Yes, sir.

JUDGE HINKES: You approached him then later and if my notes again are correct it was in early 1965?

THE WITNESS: Yes, sir.

JUDGE HINKES: And at that time you again broached him on the subject of private label milk; is that correct?

THE WITNESS: Yes, sir.

JUDGE HINKES: And once again he said he wasn't interested?

THE WITNESS: That is correct, sir.

JUDGE HINKES: Now, then, after that you proposed a price on Borden label milk; is that correct?

THE WITNESS: That is correct, sir.

JUDGE HINKES: How much after that? That is, how much after your early 1966 suggestion of private label?

THE WITNESS: Shortly thereafter, sir, to my recollection.

JUDGE HINKES: A matter of months or weeks you mean?

THE WITNESS: I would be inclined to think a matter of weeks.

JUDGE HINKES: And this proposal was on a price to Kroger for Borden label milk that would have a better than 30 percent rebate from list?

THE WITNESS: Yes, sir.

JUDGE HINKES: And how did that compare, if you kno with the A&P Borden label milk price?

THE WITNESS: I don't recall, sir.

JUDGE HINKES: You don't know whether that better than 30 percent rebate was lower or higher than A&P was paying for Borden label milk; is that what you are saying?

THE WITNESS: I don't know for certain. It is possible that it could have.

JUDGE HINKES: Could have been either lower or higher?

THE WITNESS: It could have been lower.

JUDGE HINKES: It could have been lower than A&P's price?

THE WITNESS: Yes, sir.

JUDGE HINKES: Nevertheless, Kroger turned it down; is that it?

THE WITNESS: That is correct, sir.

JUDGE HINKES: And it was then that they said that the price is $100,000 too high or something to that effect?

THE WITNESS: Yes, over $100,000.

JUDGE HINKES: IS there anything else, gentlemen? If not, thank you, Mr. Gose. You may step down. You are excused.

XXXXX (Witness excused.)

MR. MATHIAS: May we go off the record, Your Honor?

***

**

CR 1380
[illegible]
pe 2
1

MR. STONE: I think that is exactly what the testimony is directed to, among other things.

It is clear that the facts as they existed in Indiana, they are specifically on A&P's good faith, if indeed it had such.

JUDGE HINKES: I must overrule the objection, it seems to me, and at least entertain the testimony for the probative value it may be given.

Would you restate the question?

By Mr. Stone:

Q How many days per week did ~~Boman~~ Bowman deliver milk to stores in the Lake and Porter County area in 1965?

A Six days.

Q Would the branch have delivered fewer days per week to stores?

MR. CURNIN: I object.

MR. STONE: On what grounds?

MR. CURNIN: That is a speculative question he is putting to the witness, "Could he have done this?"

They could have done a lot of things.

JUDGE HINKES: I will sustain the objection.

See if you can make it more specific

By Mr. Stone:

Q Is there any reason why you could not have delivered fewer days per week in 1965?

***

A We'd send out an employee with a list to check the different super markets in the area for the items that we were interested in.

Q And did these items usually include milk and dairy products, sir?

A Yes.

Q And why did you compare your prices, sir?

A We wanted to be competitive.

Q During this time period, can you recall the A & P stores in Hammond ever leading off on a price reduction on milk?

A No.

Q In your opinion, based on your experience, did your Hammond store compete with the A & P stores in the Hammond in the Hammond area?

A Yes, I would say so.

Q And what is the basis for your opinion, sir?

A I would say by customer comments to us, and just being in the geographic area, people are -- would shop in our store or their stores.

Q Were your stores in the -- was your store in Hammond and the stores of A & P of comparable size?

A No.

Q Which would be bigger?

A Ours were bigger.

Q Were the A & P stores of super market size?

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: What ground?

MR. CURNIN: On the grounds I think the question is unclear. What is super market size?

JUDGE HINKES: Well, we'll see if the witness can answer that and what his understanding of it --

THE WITNESS: What was the question again?

By Mr. Mathias:

Q I asked if the A & P stores were of super market size.

A I would say they were, yes.

Q What would you understand by "super market size"? What size would that connote to you, sir?

A I would say a store size of in excess of 6 -- 6,000 square feet on up.

Q Now, sir, did the A & P stores have parking facilitie in connection with each of them?

A Yes.

Q And did the A & P stores carry comparable stock to that carried in your store?

A Yes.

Q Now, sir, in the conduct of your business, how important is purchase price to your company with relation to your ability to compete?

MR. CURNIN: Objection, your Honor, unless limited to dairy products.

JUDGE HINKES: Would there be any reason for departing from the specific area of dairy products?

MR. MATHIAS: Yes, your Honor. I believe that it is important to peruse at least superficially the area of competition on the broad retail grocery line. This has been an area of concern by the Commission and the courts in prior cases of like and almost identical import, and we do not intend to go into those with any great degree of depth, but I do believe that it's important to explore the nature of competition in the retail grocery industry. This is the basis on which these people competed.

JUDGE HINKES: I will allow it to a limited extent, but I do think, though, we ought to get into the specifics as quickly as possible.

MR. MATHIAS: Your Honor, most of my questions will be directed as specifically as possible in milk and dairy products.

Do you recall the question now, Mr. Kristoff, or would you like it read by the Reporter?

THE WITNESS: Would you read it back, please.

(Question read.)

THE WITNESS: I -- I would say that the purchase price will affect your gross profit and your net profit, and thereby offer you a profit margin comfortable to compete and do whatever you wish to the gross -- or the profits.

BY Mr. Mathias:

Q Does it also affect your retail price on a product?

A Definitely.

Q Do you consider discounts or rebates of one or two percent on a product to be important?

A Yes, sir.

Q And why is that, sir?

A Well, again I would say it affects your gross profit, and ultimately your net profit.

Q Are discounts and rebates on milk and dairy products important to your operation?

A Yes.

Q And why is that, sir?

A Because it represents a measure, or a part of our total sales.

Q Milk and dairy products are a substantial part of your total sales?

A Yes -- not substantial, but a part of it, I would say in the vicinity of four or five percent.

Q And just how important is milk to your operations?

A Well, it's an item that is purchased daily by most families. Everyone drinks milk, and it's a perishable item that cannot stand, or cannot keep too long in the refrigerator at home, so we buy it fresh every day so the customer can't keep it too long, so they are in almost every day for milk, or at least two or three times a week for milk.

Q And does this draw -- when they come in to purchase milk, do they purchase other products?

A Right. They purchase other items, right. It's a full service.

Q In relation to your other, the other products carried in your store, is milk a high volume item?

A Yes, it is. I would say it's of a single item, yes.

Q Well, are the consumers generally familiar with the milk prices in the various stores?

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: We will first have to find out whether there is any basis for this witness knowing that.

MR. MATHIAS: Your Honor, I believe that the witness has already stated that the consumer shops frequently for milk, and that the consumer has asked concerning prices. I was just getting down now to the question of whether or not they were peculiarly conscious of prices on milk.

MR. CURNIN: The witness is being asked, your Honor, to report on the state of mind of consumers.

JUDGE HINKES: The witness has stated that he talked to his customers generally, and I think that the witness should be asked at this point whether his conversations with the witness concern -- with the customers concerned the area in which you are interested now, Mr. Mathias.

MR. MATHIAS: All right.

By Mr. Mathias:

Q Have you ever had conversations with customers concerning milk prices, sir?

A I don't recall particularly a conversation on milk.

Q In your opinion, what affect would it have on your business if you sold milk at a price higher than that charged by the corporate chains in your market area?

MR. CURNIN: Your Honor, may we have --

MR. SCHAEFER: Objection.

JUDGE HINKES: Mr. Schaefer?

MR. SCHAEFER: Well, may I say that the, that the question as to corporate chains contains no reference to anything that is identifiable in the area -- in the record.

The area is not defined. This is the kind of general conclusory question that I have been trying to avoid objecting to, but it seems to me that the questions have to be related to specifics, and to this witness' specific knowledge, and have no appropriate foundation.

MR. CURNIN: It also appears to be a hypothetical question, your Honor.

MR. MATHIAS: Your Honor, I mean, this is a business man.

He is -- he certainly would have an opinion as to the affect of a selling price on a major item in a store. I believe it's appropriate to ask him this question, and I have stated "your market," -- the market we have been discussing is the Hammond market, the Hammond area, so that I believe --

JUDGE HINKES: And what corporate chains are you speaking of?

MR. MATHIAS: Well, let's go back one step.

BY Mr. Mathias:

Q Mr. Kristoff, what corporate chains, other than A and P are located in the Hammond area?

A We have National Tea, Kroger, Jewel.

Q Now, if you sold your milk at a price higher than any of these four corporate chains -- that is, A and P, National Tea, Jewel or Kroger -- in your opinion what affect would this have on your business?

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: I will overrule the objection. I think this witness ought to be in a position to answer that.

MR. SCHAEFER: Can we identify the product, your Honor?

MR. MATHIAS: I have said milk.

JUDGE HINKES: Can you answer?

THE WITNESS: I would say it would definitely hurt our business if it were priced too high.

By Mr. Mathias:

Q Mr. Kristoff, are you familiar with the term "leader" as used in grocery merchandising?

A Yes.

Q And what does this mean, sir?

A I think all food stores -- we use leaders ourselves -- it's an item that you may select a price very competitive or very low, to draw customers in.

Q Now, is milk sometimes used as a leader in the Hammond area?

A I don't think it has been, no.

Q By any, any stores?

A There are some stores that have -- small supermarkets or superettes, or convenience stores have used it.

Q But you have not used it as a leader?

A No.

Q To your knowledge have any of the corporate chains used it as a leader?

A I don't think so.

Q Sir, if you were able to purchase milk at a lower cost than your competition, what competitive benefits, if any, would this give to you?

MR. CURNIN: Objection, your Honor; hypothetical.

JUDGE HINKES: Overruled. I will allow this witness to answer.

MR. CURNIN: May I have the question, your Honor?

JUDGE HINKES: Yes.

Would you read it back, please.

(Question read.)

THE WITNESS: It would offer a higher gross profi to us, which would, we would have more comfortable gross profit-net profit, and the money could be used, either kept in reserve or used to be more competitive, increase advertising or something.

By Mr. Mathias:

Q Mr. Kristoff, are you familiar with the dairy purchasing practices of your Hammond store during the period 1966 through 1970?

A Yes.

Q From whom did you purchase milk and dairy products during this period?

A The Borden Company and Meadowmoor Dairy.

Q Now, in connection with the purchases from the Borden Company, how were you billed, sir?

A Received a weekly summary billing, and a monthly total billing for four to five weeks.

Q Now, were you -- did you receive a, the bill from the driver, or was this a matter of central billing from Bordens?

A Central billing to our office.

Q Now, did you receive rebates or discounts off of the invoice price from the Borden Company?

A Received a check.

Q And what did this check represent, sir?

A Approximately seven percent of the purchases.

Q In other words, this was a rebate based upon a percentage of your total purchases?

A Right.

Q And how often were these rebates paid, sir?

A Once a month.

Q And when would the rebate for a particular month be paid?

A In the following month, approximately the middle, towards the end of the month.

Q And for what time period, if you know, would these rebates be paid? Would they be paid for a straight calendar month, or would it be a --

A A four or five week period, because they were weekly billings.

Q Now, did you also purchase ice cream from Borden?

A No.

Q Now, in addition to rebates based on a percentage of your sales volume, as noted, did you receive any other payments or financial aid from Borden?

A No.

Q Did you receive any loans through them?

A No.

Q Did you receive any interest subsidies from Borden on loans that you made with others?

A No.

Q Did you obtain any equipment from the Borden Company?

A No.

Q Now, were there any payments of any nature other than these rebates during this period of time that you can recall, other than your regular monthly rebate checks?

MR. CURNIN: What period of time are we talking about, your Honor?

MR. MATHIAS: We were talking about 1966 through 1970, but I will make it a little more specific.

During the period of time in this case, from October, 1966, through March of 1967 and June of 1969 through March of 1970, --

THE WITNESS: Other than the --

By Mr. Mathias:

Q -- other than the regular monthly rebate check.

A Yes, some coupons, coupon -- we actually took coupons for an item and returned them to the Borden Company, and received payment for those. They were not milk-related, though.

JUDGE HINKES: They were not milk-related?

THE WITNESS: No.

They might be dry milk or something. I don't know.

By Mr. Mathias:

Q Now, in January of 1967, did you receive a second check from the Borden Company in the amount of $207.63?

A That is right.

Q And do you know what that was for, sir?

MR. CURNIN: Your Honor, I don't wish to interrupt but the dollar amount and the month somewhat came out of the blue for me. If the Court would permit me, I would like to have that question read back.

JUDGE HINKES: Yes, surely.

(Question and answer read.)

MR. CURNIN: Your Honor, when Mr. Mathias refers to a second check, does that mean in addition to the monthly rebate checks that he has been talking about?

MR. MATHIAS: Yes.

JUDGE HINKES: Can you explain that?

THE WITNESS: Yes.

I don't know what it's for.

By Mr. Mathias:

Q In other words, you did receive two checks during that month?

A Yes. Our records indicate that; however, I do not know what it was for.

Q You do not know what the check in the amount of $207.63 was for?

A No, I don't.

Q I show you a page of your ledger sheet -- I show you a copy of your ledger sheet which shows an entry of a deposit for January 19 in '67, and there is a marking, "Bordens," and then a small letter "a" and then the amount "$207.63."

Is this the check to which has just been referred

Q Are we able to, by review of the tax returns, able to determine the gross revenue from your operation of your store in Hammond, Indiana?

A No.

Q To your knowledge, Mr. Kristoff, were different accounting methods used in the preparation of the financial statements as contrasted with the tax returns?

A No.

Q Your Hammond store was located at 6529 Columbia Avenue?

A That is correct.

Q During this period 1965 through 1970, how many days a week did you receive deliveries from the Borden Company?

A Five or six days. I would say probably six days.

Q And during this same period of time, did you receive special deliveries from the Borden Company at this store in Hammond?

A On occasions we might have, yes.

Q When the driver delivered the milk to your store in Hammond, to what point in the store did he deliver the milk?

A In our -- called our dairy cooler and refrigerated cooler.

Q And did that have a door that he could reach from the outside, or did he have to come into the store to make the delivery?

A He had to come into the building and then into the cooler.

Q And once he got into the cooler, would he stack the cases that he was deliviring?

A That's right.

Q Would he also while he was there rotate the stock?

A Yes, he would.

Q Would he at that time also remove, to the extent that any existed, outdated merchandise?

A Yes.

Q Did the Borden driver during the same period of time ever check your dairy case, which was in the retail portion of your store?

A Yes, he would.

Q And would he rotate stock in the dairy case?

A Yes, he would.

Q And would he remove outdated merchandise in the dairy case?

A Yes.

Q Did you receive a credit for outdated merchandise from the Borden Company during this period of time?

A Yes, we did.

Q And so that it would be correct to say that the Borden Company ran the risk of spoilage on their products from time to time, offers from Meadowmoor in an attempt by Meadowmoor to take over and obtain more of your business?

A Could you repeat the question, as an attempt to --

Q Well, let me rephrase it.

You testified that you were supplied during this period of time by both Borden and Meadowmoor.

A Right.

Q How much of your daily business did Borden have during this period of time, and if it changed, would you let me know, sir, in this one store, now --

A Yes.

Q -- in Hammond, and although I don't specifically refer to the Hammond store all the time, that is the store I am concerned about.

A Right.

Q And all of my questions are directed to the store in Hammond, Indiana.

A Right.

Q During this period of time, '65 through '70, what percentage of your milk and dairy business was handled by the Borden Company?

A I would say between 30 and 40.

Q Did it change at all during this period of time, sir?

A It was -- no, I would say it was fairly constant.

Q Did the Bordon Company, during this period of time, endeavor to increase their percentage of the products, of their own products sold out of your Emmond store --

A No.

Q -- by offering you special discounts?

A No.

Q Did you receive offers from Meadowmoor?

A No.

Q Did they both charge the same ~~inter~~ into-store price on milk and dairy products?

A Not always. It varied sometimes.

Q Sometimes Meadowmoor would be lower than Borden --

A Right.

Q -- and vice versa?

A That's true.

Q During this period of time, again 1965 through 1970, would it be correct to say that Meadowmoor generally was lower on its milk and dairy prices, and that is why it had 70 percent of the business, or 65 percent to 70 percent of the business?

A Yes.

Q Pleasant View Dairy and the others that you mentioned, were they local brands with local acceptance in the Hammond area?

A Yes.

Q Did they offer you a price on milk and dairy product which was lower than that being charged by the Borden Company, if you can recall, sir?

A I don't think so, no.

Q Did you receive offers from other dairies, the prices of which were lower than that being charged by Borden?

A I would say they were all pretty close to the same. There was no drastic price cutting of any kind.

Q But may there have been offers, or did you receive offers during this period of time from dairies offering prices lower than that being charged by Borden, even if it was only a slight difference, as you have described it?

A I would say on occasions that there might have been a half a cent, or a cent a gallon.

Q In your opinion, Mr. Kristoff, was the gallon the most competitively priced milk package during this period, '65 to '70?

A Yes.

Q And was also more milk sold in that package than any other?

A In single, single item, yes; not dollarwise, but single item, yes.

Q You may have testified about this earlier this afternoon, Mr. Kristoff, but it's not clear from my notes; were you billed at list from the Borden Company, or were you billed at a net price?

A A net price.

Q Were you ever shown, or did you ever see Borden's published discount schedule as applicable in the Hammond area?

A No.

Q Were you aware during this period of time, 1965 to 1970, that Borden did have a published discount schedule

A I was not aware of it. I did not see it.

Q You testified that you were billed at net.

You have also testified, I believe, that in addition to that you received a rebate check -- I think is how you described it -- from Borden as well.

A Right.

Q So that if I may use this terminology, the amount of the bill wasn't a net-net billing, it was a billing from which further deductions were going to be made substantially on a monthly basis?

A That's correct.

Q You testified about rebate checks, and did you receive, in addition to rebate checks, checks for allowances?

A No.

Q You testified this morning that there was a check received in January of '67, I believe, for $207.63, and that is Commission's Exhibit 268 , for identification, next to which appears a little "a"; was that an allowance check or --

A Yes, it was an allowance check.

Q And it was an allowance received in part -- or not in part, it was an allowance received on your milk and dairy purchases from Borden for the prior month?

A That I do not know.

Q Did you receive this amount of money in check or cash?

A It was a check.

Q Were you purchasing anything else from the Borden Company?

JUDGE HINKES: Anything but --

By Mr. Curnin:

Q Other than milk and dairy products.

A Oh, yes.

Q And what, such as?

A Well, we have there Borden's Instant Milk; we have some, a lot of dairy items that are Borden's. There is a Borden's Potato.

You have -- Bordens I believe has a, like a cremora. It's a substitute cream item, dehydrated cream.

Q Did you receive, during this period of time, allowances on those items, sir?

A Not to my knowledge.

Q So that to the best of your knowledge and belief, this figure here, this amount, the $207.63 was received from checks with your purchase of milk and dairy products from the Borden Company?

A I have no way of knowing at this time. It could have been.

MR. CURNIN: I am going to show the witness Xerox copies of a document entitled, "Cash receipts, 1966"; if Complaint Counsel has the original, I will show that to the witness.

MR. MATHIAS: That is the same as yours. I obtained it from you.

MR. CURNIN: Well, I mean, this document, if there is any question, was produced by Complaint Counsel to Counsel for A & P, and Counsel for Bordens, I think within the last seven days; is that not correct?

MR. MATHIAS: This, I take it this is the one. You resupplied me with a copy this morning.

MR. CURNIN: Well, I Xeroxed what you supplied me. Is there any question about that?

MR. MATHIAS: Well, if that is the case, then it's the same thing.

By Mr. Curnin:

Q I notice this document is entitled, "Cash receipts"?

A That's right.

Q Would it be proper to assume, then, that it is a reflection of, and a recording of monies received in the form of cash?

A Or -- it's or check.

Q Cash or check?

A Um-hmm. This whole sheet is cash or check.

Q Going down the first sheet, Mr. Kristoff, and across from November 1, 1966, someone has circled "Bordens, $~~43~~443.78"; does that reflect a check you received from Borden?

A Yes, that is.

Q Or cash which you received from Borden?

A It would be a check.

Q And that was a further reduction in the charge imposed by them on your purchase of milk and dairy products?

A I have no way of knowing that. It's from the Bord Company, but I don't know if it came from the milk, or where it came from, other than it's marked Bordens.

Q Well, did it come from -- and does it constitute a rebate on your purchase of milk and dairy products?

A I would, not knowing actually receiving the check, I would assume it was on milk products. I mean, I don't know. I would assume it's milk products.

Q Let me show you this document, Mr. Kristoff, and I ask you, or I direct your attention to the second sentence--

A Yes.

Q -- and ask you if that refreshes your recollection, if these entries for check or cash payments were not received by you as rebates from the Borden Company on your purchase of milk and dairy products.

A Yes.

Q And that would be a check received on your purchases in the month of October?

A Right.

Q Is this in addition to the regular monthly rebate check that you received from the Borden Company?

A I would assume it, yes.

JUDGE HINKES: You say you would assume that; are you saying that you know, or you don't know?

THE WITNESS: Well, it's, you know, it's a ledger entry. It says the Borden Company, and it's, you know, the amount is in there, and I would say we have received very few checks other than Borden checks -- coupon and other allowances are very limited, so I would assume this came from Borden, from the milk.

JUDGE HINKES: But the question was not whether

***

ch8

A Right.

Q And you testified in regard to what's now Page 22D, that that was different from the regular monthly rebate check which you received from the Borden Company.

A Are you referring to that one that was $207.59 or something?

Q $207.63, sir.

A Yes.

Q Does that mean that all the Borden checks which are entered here with the designation "a" are checks received in addition to the one regular monthly rebate check from the Borden Company?

MR. MATHIAS: Your Honor, I object to the -- to the use of the word "addition" here.

THE WITNESS: Yes, that's confusing me.

MR. MATHIAS: This -- Mr. Curnin is characterizing these entries, and I believe in an unfair manner.

JUDGE HINKES: Well, wait a minute. Let's see if we can't straighten this out.

Mr. Kristoff, earlier in your testimony you were asked about an item of $207.63.

THE WITNESS: Right.

JUDGE HINKES: If I understood your testimony, you said that that amount of money was received from Borden's as a rebate on your milk purchases in addition to the regular monthly rebate that you were getting from Borden. Now, is that correct or is that incorrect?

THE WITNESS: Yes, for that one month, that one particular month, two checks were entered.

JUDGE HINKES: All right. Now, that amount, that $207.00 amount was marked with a letter "a".

Now, the question is, that being the case, that is, $207 followed by the letter "a", does it mean that every time a rebate amount appears from Borden on that batch of documents, that that amount followed by "a" is also an amount that you received in addition to the regular monthly rebate that you get from Borden? Does the letter "a" mean that in every instance where it appears, just as it happened to mean it in the $207 item?

THE WITNESS: Right.

JUDGE HINKES: It does mean that.

THE WITNESS: (Nodding head.)

JUDGE HINKES: That is to say, every time the amount appears followed by the letter "a", an amount that you received from Borden, it is in addition to the regular monthly rebate check that you got?

THE WITNESS: Now, I only received one check per month

JUDGE HINKES: That was regularly?

***

h12 "I will put up a display for you and I'm from the Borden Company. If you put up Borden's dehydrated milk, I'll give you ten dollars." Now, that would appear the same way as an "a". Now, that does not necessarily mean that it came from the Borden milk division.

JUDGE HINKES: Even if it came from the milk division, the fact that the amount is recorded with an "a" following doesn't mean that it is an second rebate for a given month?

THE WITNESS: Right, it does not mean that necessarily.

By Mr. Curnin:

Q Who maintains, or who during this period of time -- and we're talking here about October, '66 through -- maybe you can tell us the last date -- sometime in 1967 -- who in your organization maintained the cash receipt books?

A Our office manager, Mr. John Dykstra.

Q And do you know why he recorded some Borden cash or check payments without a letter designation and others with a letter designation?

A It's just an error, an omission. It was not intentional.

Q No, but you don't know if he had any reason for --

A No, he just accidentally forgot to put it down.

Q Mr. Kristoff, directing your attention to the second page of this exhibit, there's an entry there, "Borden's, $322.59", and a date, November 23, 1966.

That's a rebate check you received from Borden on the purchase and sale of milk and dairy products for the prior month?

A Yes.

Q Now, when did you receive, generally receive those checks from Borden? Would they have been toward the end of the month covering the prior month?

A Yes, from the middle towards the end.

Q Turning to the next page, which is now going to be Respondent A & P Exhibit 22C, I see at least two entries for Borden. One appears in the third group and the dollar amount of $349.58.

A That's a duplicate entry. It's an error.

Q The entry appears where else, sir?

A Under Detail G and also down below.

Q You mean it appears on three spots on this page or two?

A Two.

Q What is the difference between Detail G and Detail H?

A They are different days.

Q Different days, sir?

A It's a double entry, yes.

h14

Those amounts are double entered.

Q You're saying he should have entered it once --

A Yes, that's an error.

Q This Detail G, what does that mean, sir?

A That is a particular day. If you will note on the cash receipts line, we have a limited space, so if we have more than two items to fit on that line, we put it in, call it a detail, and that Detail G is the amount of or the check that are received that day and are listed.

Q For any particular reason? I mean, why isn't it given some other designation? Why the designation Detail G?

A Well, it follows F, which is the next detail for the next page. And the next detail after it for the next day would be Detail H. And it would appear on this line, on this cash receipts, as a detail number.
We tie the two in then, the date it was received or entered.

Q Detail G, do you know what days of the month that purports to cover?

A Withoutsseeing the left side, I can't say.

Q And turning to the next page, D, sir, there's an entry for Borden in the second group, $207.63. That reflects the rebate received in January for December's purchases of milk and dairy products from way his direct examination.

He is here, and Complaint Counsel has told us to verify the net prices paid to during what Complaint Counsel considers to be the relevant time period.

I am not going into an issue, your Honor, which is beyond Complaint Counsel's direct.

MR. MATHIAS: Your Honor, we have not gone into the net price paid by the witness. We have not produced any invoice for him to connect up these payments with. We have simply gone into one document which was information in addition to that which we had received from the Borden Company.

MR. CURNIN: This witness is here, your Honor, to --

MR. MATHIAS: We merely asked, -- as a matter of fact, we did not even go into the document. We haven't offered it in evidence. We merely asked if he could tell from his recollection the nature of a payment that may have been received from the Borden Company in the month of January, 1966.

MR. CURNIN: Your Honor, the purpose of this witness' testimony now is to verify Commission's Exhibit 265.

It was on --

JUDGE HINKES: To verify it after it has been received?

MR. CURNIN: That's correct, your Honor.

JUDGE HINKES: If it was not verified at the time of receipt, that was your fault. It should have been objected to on that basis, and it would have been sustained, but the document was received, because in my opinion it was receivable in evidence.

This witness cannot verify something to my satisfaction after it has been received.

MR. CURNIN: Your Honor, we did object to the receipt of 265, and it's complaint counsel's statement here on the record that this witness' testimony is being elicited to verify 265, because he, himself, has discovered a discrepancy in 265.

MR. MATHIAS: No, your Honor, I am not requiring any verification of 265.

JUDGE HINKES: No, what he is trying to do is explain an apparent discrepancy in 265 by the entry of two items.

MR. CURNIN: And then the witness' testimony on direct, your Honor, was that he had received two checks in the month of January covering December, and what we are just trying to get at here is just what are the facts.

THE COURT: I understand that, but I say the time for that is when you present your defense. I will not allow further questioning on this document on matters that have not been brought into the direct examination

***

A Right.

Q Now, during this period of time, were you advised by the Borden Company that at your option you could receive a further discount if you did the pre-ordering?

A No.

Q Were you advised by the Borden Company during this period '65 through '70 that if you accepted drop shipments, in other words, that the milk and dairy products would just be dropped in your cooler, but there would be no rotation of stock, nor removal of outdated merchandise, that you could receive a further discount?

A No.

Q Did you during this period of time receive any in-store promotional allowances from Borden?

A Yes.

Q On milk and dairy products?

A Right.

Q And did you also receive from the Bordon Company point of sale promotional material?

A No.

Q Did Borden during the course of the year provide demonstrators in your stores?

A On occasions they did, yes.

Q And were you visited on a monthly basis by the Borden salesman?

t6 MR. MATHIAS: Your Honor, I'd like for Mr. Curnin to go as far as he can, even if he has to cut off in the middle of a line of questioning. We do have other witnesses scheduled for tomorrow, three others, and I would like to --

MR. CURNIN: I'll go forward, your Honor, if complaint counsel wishes.

JUDGE HINKES: Well, I think you should go forward at least for another 20 minutes, but I don't think we want to run past 4:15, in any event.

By Mr. Curnin:

Q Will you describe for us, Mr. Kristoff, the approximate number of square feet of your Hammond store?

A Oh, about 55,000.

Q And during what hours was your store open during the period 1965 to 1970?

A 9:00 a.m. to 10:00 p.m.

Q And would that have been six days a week, sir?

A Right. Closed on Sunday.

Q You have identified for us certain corporate chains which were in operation in the Hammond area during this period of time.

Are you able to break them down between primary competitors and secondary or less significant competitors

Q When you say 166th (sic) Street in Hessville, is that outside Hammond or --

A It's in Hessville. It's a suburb. It's in the City of Hammond, but it's called the Hessville section. It's near Kennedy Avenue, which is a north-south street.

Q Was A&P's competition with your store on the same magnitude as Jewel and First National (sic)?

A No.

JUDGE HINKES: First National?

MR. CURNIN: Excuse me, your Honor. National Tea, your Honor.

THE WITNESS: National Tea.

MR. CURNIN: I'm referring to a local supermarket. I stand corrected.

By Mr. Curnin:

Q You testified that you competed with these three A&P stores.

By that did you mean, sir, that your store and these A&P stores drew customers from the same general area?

A Yes.

Q Isn't it a fact, Mr. Kristoff, that none of the A&P stores was ~~a~~ significant a competitor ~~of~~ as Burger during this period of time?

A I would say so, yes.

0b2rt10 Q And isn't it true that the three A&P stores that you're talking about were much smaller in size and were not maintained or spruced up to the extent that your store was in Hammond during this period of time?

A Yes.

Q And isn't it also true that some of these A&P stores have since closed down?

A Yes, one closed on Homan Avenue.

Q Do you have any records, Mr. Kristoff, of the retail prices that were charged in your Hammond store for milk and dairy products during the period 1965 to 1970?

A No.

[***

there is still, this case still involves A&P rather than Jewel and National Tea, and I believe this line of questioning is irrelevant under those circumstances.

MR. CURNIN: Your Honor, I think I have but one question here, and I would like to ask that of the witness, and if there is an objection to it, then we can discuss it at that time, but hopefully we won't, because it is almost ten after 4:00.

By Mr. Curnin:

Q During this period of time, 1963 to 1970, did you lower your retail on milk other than to meet a competitive situation?

A During the period of 1965 to '70 I can't recall lowering any prices on milk. It's always had an upward trend, except for a feature or sale item.

Q Was anyone the price leader in your area on milk products?

A I don't have any.

I have -- I know of no one that was a price leader, no.

Q Has your milk and dairy business shown a steady growth during the period 1965 to 1970?

A Our volume has increased, so I would -- our volume in milk sales has gone up also, yes.

Q And your net profits have gone up on your milk and rt9

dairy products?

A I wouldn't say it's gone up, no.

Q But your volume has increased other than that?

A Volume increased, but the net profit has gone down.

Q Is that in absolute dollars or a percentage, sir?

A The profit?

Q Yes.

A Percentagewise it's gone down.

Q Has the profit, however, gone up in absolute dollars?

A Because of increase in cvolume I would say it has increased, yes.

Q And has your profit on milk sales been higher than your profit on grocery sales in general during this period of time?

A That is a speculation. I couldn't really -- I have no -- no figures or any inventories or anything to substantiate that as a positive answer.

Q Would it be correct to say that your over all business during this period, 1965 to 1970, has grown?

A Our over all sales has increased.

Q Yes.

A Yes.

Q And have you opened up still a third store?

A Right.

Q And when did that occur, sir?

A 1970.

Q And did you open this up in part because of the high volume of business that you have been generating in your existing stores at that time?

MR. MATHIAS: Your Honor, I am going to object. I think this question is irrelevant to the issues of this case.

MR. CURNIN: I think it's relevant, your Honor, in the question of potential injury.

JUDGE HINKES: Overrule the objection.

You may answer it.

MR. CURNIN: Would you like to have the question read back?

THE WITNESS: Yes.

MR. CURNIN: Your Honor, may we have the question read?

JUDGE HINKES: Read the question.

(Question read.)

THE WITNESS: I would say that for maybe two or three reasons; that is one reason, increase in volume, and just the growth that we feel that we deserve for our employees to expand into a third store.

By Mr. Curnin:

Q Has your profit in the operation of your stores increased in terms of absolute dollars during this period '65 to '70, sir?

A Yes, it has.

Q Have you undertaken any study or analysis of the profitability of your milk and dairy sales during this period '65 to '70?

A None, other than what, what it costs, what you sell it for and figure out your gross profits on the item.

I don't know if that answers the question.

MR. CURNIN: Your Honor, I am about to embark upon another line of questioning with this witness, and I note that it's almost 4:15.

JUDGE HINKES: We will recess at this time.

We will resume tomorrow at 9:45, if that is agreeable with everybody.

MR. MATHIAS: Fine, sir.

JUDGE HINKES: Very good. And we will expect you back again at that time, Mr. Kristoff.

THE WITNESS: All right. Thank you.

(Whereupon, at 4:15 p.m., July 16, 1973, the hearing in the above-entitled matter was adjourned until 9:45 a.m., July 17, 1973.)

***

A I don't quite understand your question. The income tax returns are prepared by our accountant from our financial statements to establish our obligation for taxes.

Q And in establishing your obligations for your tax payments, isn't one of the purposes to maximize the expenses of the corporation so as to minimize, within the law, the profit that the corporation will have to pay a tax on?

A Well, I would assume that they were prepared in an accountant manner that's acceptable by the government. I don't know if his end results or criteria of preparing the statement is that. I've never questioned him.

Q To your knowledge, did A & P's introduction and sale of private label milk and dairy products during the period 1965 through 1970 injure the business of Burger's Super Markets?

A No.

MR. CURNIN: Your Honor, I ask at this time if there is any interview report of this witness, that it be made available to us.

MR. MATHIAS: Your Honor, the only -- we -- the only interview report that I am aware of may not have been turned over to Respondents was a statement that -- not a statement -- rather -- but an interview

By Mr. Mathias:

Q Mr. Kristoff, in response to some questions from Mr. Curnin yesterday, you noted that on occasion the Borden Company made special deliveries to your store. How frequent were those occasions, sir?

A Very seldom. I'd say maybe one or two a year at the very most.

Q And what were the usual causes for these deliveries, sir?

A Usually they were promotion items in the store we have on sale, and we would run short. The demand would be a little heavier than we anticipated. If we'd run short, they'd make a special delivery to resupply the store.

Q Now, also in connection with some of the questions asked by Mr. Curnin, you noted that the Borden driver rotated the stock in your dairy case in the store and removed outdated merchandise.

Was this a day to day process which the driver followed? Did he do this for you every day?

MR. SCHAEFER: Objection, your Honor. Here again we'll have to impose our objection on the period of time and ask some definition as to period of time.

MR. MATHIAS: Your Honor, I think that we've laid the groundwork insofar as Count 3 is concerned.

None of the testimony of this witness goes beyond the period of 1968, and I don't believe we need a continuing interruption of this.

JUDGE HINKES: Very well. We have that understanding.

THE WITNESS: I wouldn't say he did it every day. There would be days he wouldn't check it.

By Mr. Mathias:

Q Now, did he completely stock your case on the days when he did rotate the product?

A No.

Q Approximately what percentage of the milk delivered would be wheeled directly into your cooler?

A I would say about 99 percent of it.

Q And how much would be put in the dairy case, then.

A Usually the items that we were out of, that we had none in the case at all, he would bring out and put in the case for us.

Q Now, as to the removal of outdated merchandise, was out -- did you -- was there a very large volume of outdated merchandise in your cases over a period of time?

A No.

MR. CURNIN: Objection, your Honor, unless we know what point of time he is referring to.

MR. MATHIAS: We are talking about this period 1966 through 1970.

MR. CURNIN: And also, your Honor, objection; what does the complaint counsel mean by "very large"?

MR. MATHIAS: Your Honor, if the witness can questioning that took place, which were received, and which was answered by the witness, without objection, and consequently I see no reason for getting involved in a rehash of the entire subject matter.

You may continue, Mr. Mathias.

MR. MATHIAS: I will rephrase the question, since I am sure that question has been lost.

By Mr. Mathias:

Q Mr. Kristoff, how would you describe the volume of out-of-date merchandise, Borden merchandise found in your store, in your dairy cases?

MR. CURNIN: Objection, your Honor, unless it's limited to a point of time.

MR. MATHIAS: This is during the period 1966 to 1970, your Honor, just as the previous question.

JUDGE HINKES: '66 to '70, right.

THE WITNESS: Very small percentage-wise. Very insignificant.

By Mr. Mathias:

Q Was there out-of-date merchandise in your case every day?

A No.

Q Was this a frequent or infrequent occasion?

A I would wsay it was infrequent.

Q Now, Mr. Kristoff, did you have an employee in your store who had charge of rotating and caring for the dairy case?

MR. SCHAEFER: Continuing objection, your Honor.

JUDGE HINKES: The objection is noted.

THE WITNESS: Yes.

By Mr. Mathias:

Q And for the great -- strike that.

And on a day-to-day business was it this employee who did the rotating and stocking of your dairy case in the store?

MR. CURNIN: Objection, your Honor, unless the witness has personal knowledge.

By Mr. Mathias:

Q Do you have personal knowledge?

A I have personal knowledge, yes.

Yes, It was done that way.

Q Now, Mr. Kristoff, in response to questions of Mr. Curnin, you mentioned that at times Borden would supply demonstrators for your store.

Now, first of all, sir, what is a demonstrator?

MR. SCHAEFER: Continuing objection, your Honor, to this whole line of questioning.

JUDGE HINKES: It is noted.

THE WITNESS: A demonstrator is a girl,

h7

woman, would come in and there would be an item that would be on sale, and she would pass out samples, or talk of the item, suggestions that the customer might want to purchase it.

By Mr. Mathias;

Q Now, during the period 1966 to 1970, how often were demonstrators supplied to your store, sir?

A I would say maybe three or four.

Q Three or four times?

A Yes.

Q Now, sir, in response to questioning from Mr. Curnin this morning, he asked a series of questions concerning dairies' offers of loans and equipment.

Were you offered loans and equipment by dairies during this period, 1966 to 1970?

A No.

MR. MATHIAS: Your Honor, could we have just a few brief moments recess, and I think that I am completed, but there are some notes from yesterday that I would like to quickly review.

JUDGE HINKES: Very well.

(Short recess.)

MR. MATHIAS: Your Honor, we have no further redirect.

MR. CURNIN: No recross, your Honor; however,

***

realized there could be no price break, not on one product, but not on any one of the 11 products.

In effect, this resulted in the involvement of orden in the setting of A&P's margins and prices across each of the 11 product lines.

Q How did the post-contract pricing behavior of both parties influence your opinion that there was communication or assurance in this matter?

A After this contract was negotiated, after the first of November, there was no drop in the retail price of milk by A&P, even though there has been a substantial drop in the wholesale price. That is, A&P's behavior is consistent with the existence of this mutual assurance.

Borden, on the other hand, did not offer this same price to other large purchasers in the market. Thus, Borden's behavior is consistent with the mutual assurances that have been described.

Q How did the fact that the agreement was terminable at the will of either party influence your opinion in this regard, sir?

A This was a very hazardous contract, especially for Borden. And this acted as a safety valve which could be used if the price of milk broke.

Q To summarize briefly, what is the horizontal line in CX-257 supposed to show?

[***]

***

never come to a conclusion that / might be represented by agreement.

If they do finally enter the position of buyer and seller then there are involved in there some sort of terms.

Q So you consider every transaction consisting of a sale by the one party and a purchase by the other as creating agreement or contract of sale?

Is that what you had reference to?

A Yes, that is fair.

Q In such relationships of buyers and sellers is it abnormal to find that such relationships can be stopped by either party at any time?

A No, I would not say that that is abnormal.

Q Are you familiar with any milk supply agreements between dairy processors in the Chicago area other than Borden, and their customers?

A No.

Q Now, looking at Commission Exhibit 257, did I understand correctly that this exhibit tends to give the point of view from the consumer's angle?

A You mean just the whole thing?

Q Yes, sir.

A No. I would say it gives it from the point of view of the economists' angle.

***

I also understand, your Honor, that --

MR. STONE: I have no objection to that procedure, your Honor.

JUDGE HINKES: Let's try it that way, sure.

MR. STONE: During --

MR. CURNIN: Excuse me.

If we may, on this point I understand that Complaint Counsel said that he is going to inquire as to the competitive condition through the year 1966.

It's my understanding in this case that evidence of alleged competition and alleged injury is only going to be offered for a two-month period in that year; if so, I think the --

MR. STONE: Your Honor, --

MR. CURNIN: -- questions should be limited to that time period for this reason: Yesterday we entered into a considerable amount of discussions as to the scope of the cross examination that would be permitted to A&P.

Mr. Soeffing, in examining the retailer who was here yesterday, was permitted to examine generally for the period 1966 through 1970; however, when it came time for us to cross examine, your Honor directed that we be limited only to the periods of time during which Complaint Counsel would be offering evidence of alleged

h10

injury to competition.

I note, however, that when Borden sought to examine for the period '64 to '68, Complaint Counsel raised no objection, but I think we ought to get the time period well defined now on direct so that we don't run into the problems we did yesterday when it comes our time to cross examine this witness.

MR. SOEFFING: Your Honor, if I may answer this question, since I was the one involved, I think that it is a, not a correct characterization of the record.

As I understood it -- and this has no bearing on Mr. Stone's witness, and he may speak to the time periods he is interested in, I am only interested in clearing up what happened yesterday.

As I understood it, we asked certain general questions, and I think cross examination will show so did A&P for the period 1966 through 1970.

When it came time to talk about certain detailed figures, we were talking at that time about the period October 1966 through March of 1967, and June of 1969 through March of 1970.

Your Honor did not restrict the cross examinati of respondent to those periods.

Your Honor restricted a slight portion of the

1486

cross examination of the respondents to those periods; that is the way I remember the record.

MR. STONE: Well, at any rate, your Honor, getting on to the point we are interested in right now, I propose to examine the witness about the period 1965 and 1966 to establish some continuity concerning conditions which existed at or about that time.

I think to examine a witness about two months when the period is one almost a decade ago would be an undue burden upon the witness' memory.

JUDGE HINKES: Well, may I suggest you do it this way, then; let's question the witness about 1966, ascertain from the witness whether that differed in '65 so that we don't have to simply go through the whole recitation twice, and then ascertain from the witness whether, for the specific months in '66, the situation was any different than what he has testified to.

MR. STONE: Certainly.

MR. CURNIN: Your Honor, with the Court's permission, I would ask Mr. Stone to ask the question again about the location of the A&P Store, please.

JUDGE HINKES: I didn't hear that. Did you ask about the location of the A&P store?

MR. STONE: Yes, I asked if there was an A&P

store, how close was the nearest A&P store to the store of Mr. Lasorso during the period of 1965 and 1966.

JUDGE HINKES: I see..

MR. STONE: I believe he has answered that question.

JUDGE HINKES: Well, let's restate the question and let's stick to 1966, as I have suggested.

By Mr. Stone:

Q Mr. Lasorso, in 1966, what was the location of the nearest A&P store to your store?

A About two blocks.

Q And what was the address of that store?

A It was in the 9600 block on Grand Avenue.

Q Now, did this situation differ at all during the year 1965? Was the A & P store still there in 1965?

A Yes, it was.

Q And was the A & P store there in -- strike that question.

Now, Mr. Lasorso, during the year 1966, to your knowledge, did your customers also shop at this A & P store?

A Yes, they did.

Q And what is -- how do you know that?

A Well, they'd tell us about the different prices that they have on all products. Like if I was higher or I was low, I would be told about it, especially if you're high.

Q Now, during this period, did A & P advertise regularly in the newspapers circulated --

MR. CURNIN: Objection, your Honor, unless we're talking about milk and dairy products.

MR. STONE: May I finish the question?

JUDGE HINKES: All right. Let's hear the question first.

By Mr. Stone:

Q Did A & P during this period of time --

JUDGE HINKES: Hold your answer, Mr. Lasorso.

By Mr. Stone:

Q -- advertise regularly in the newspapers circulated in the area of your store?

MR. CURNIN: Objection, your Honor, unless it's related to milk and dairy products.

MR. SCHAEFER: Objection, your Honor, on relevance.

MR. STONE: Your Honor, I believe that both of these questions have been raised before and dealt with by your Honor.

JUDGE HINKES: Yes, I believe my ruling in other instances was to allow this type of general question to ascertain the nature of the business of the groceries and I will, to be consistent, at any rate, I will overrule the objection at this time.

By Mr. Stone:

Q Mr. Lasorso, do you remember the question?

A Yes, about the advertising.

Yes, they advertised in the papers.

Q And during this period, did they sometimes feature their dairy products?

A I believe they did.

Q And during this period of time, did they sometimes feature milk?

A I believe they have.

MR. CURNIN: Your Honor, may we determine whether or not the witness has a clear recollection of that, or if that is a speculation on his part?

JUDGE HINKES: Well, I'll leave that to your cross examination.

By Mr. Stone:

A Now, Mr. Lasorso, during this period of time, did you regularly compare your prices with those charged by your competitors, including this A & P store?

A Yes, we would look at their window signs and see if they had -- or if they had them in the local paper.

Q That would be the way you would compare your prices?

A On occasion we would send somebody into the store to look.

Q Did this include comparing your price with the price charged for milk and dairy products?

A Yes.

Q And did it include comparing your prices with those of the A & P store?

A Yes.

Q Now, why did you so compare your prices?

A Well, we wanted to be competitive.

Q Mr. Lasorso, during this period of time, what was the area from which your store drew customers, approximately?

A Well, we were in the hub of town, so I'd say a three, four-mile radius.

Q In your opinion, did your store have a generally comparable type of stock as that held for sale by the A & P store?

MR. CURNIN: Objection, your Honor.

MR. SCHAEFER: Objection, your Honor.

MR. CURNIN: No foundation.

JUDGE HINKES: Mr. Stone, perhaps you'd better establish this witness' knowledge.

MR. STONE: I think he's already testified, your Honor, that he compared the prices of various types of products.

JUDGE HINKES: Prices, yes, but now you're speaking of stock inventory identification.

By Mr. Stone:

Q Mr. Lasorso, during this period of time, did you have occasion to compare the types of products carried by your store with the types of products carried by the A & P store?

A Yes.

MR. STONE: Your Honor --

By Mr. Stone:

Q Mr. Lasorso, during this period of time, did you carry a generally comparable stock?

MR. CURNIN: Objection, your Honor.

MR. SCHAEFER: Objection, your Honor.

MR. CURNIN: No foundation.

JUDGE HINKES: Well, the foundation has been laid. If that's your only objection, it's overruled.

MR. CURNIN: May I have the question read back?

(Question read.)

MR. STONE: To that carried by the A & P store.

MR. CURNIN: May I have the previous question and answer, please?

(Requested portion of record read.)

MR. CURNIN: The witness has not testified, your Honor, that he ever did make a comparison, or if he made a comparison, did he do it on the -- did he do-- that he did it on the basis of checking the window signs and nothing more.

JUDGE HINKES: I think the answer is sufficient to establish a foundation for this question. You may go on.

MR. STONE: Would you please read the question back?

(Last question read.)

THE WITNESS: We carried, you know, the general products that they would carry, but not as big as they were.

By Mr. Stone:

Q Mr. Lasorso, how important is purchase price to your store with relation to your ability to compete with other stores?

A Well, if you buy right, you can sell right, and if you make more profit, fine.

Q What do you mean by buying right?

A Well, if the price is right -- and this is one of the reasons we are on Certified Grocers is buying right -- your cost is way down, and you can meet all the competition that's around.

Q You mentioned Certified Grocers. I take it you now belong to Certified Grocers?

A Yes.

Q And was this situation the same in 1966?

A Certified Grocers?

Q No. Did you also have to buy right or competively to sell competively?

A Yes, we belonged to Grocerland at the time.

Q Do you consider discounts or rebates of one or two percent on any product to be important?

A Very important.

Q Why?

A In the food business, you have to -- you have to get the lowest level price, or -- I mean, on your discounting or something like that, it's very important because you're only working on pennies, so it would mean so much, you know, with the volume that you have, it would give you a little more profitwise.

Q How important is milk to your operation, or was it during this period?

A Well, I imagine that it's our number one commodity for our customers to come in for, and that's at least three times a week, maybe more.

Q Are customers generally familiar with milk prices?

A Very much.

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: On what basis?

MR. CURNIN: No foundation.

JUDGE HINKES: I'll allow the question, but I would expect you to follow that up with some inquiry as to how he has that information.

MR. STONE: I believe, your Honor, that the testimony has already indicated that customers remarked as to prices.

JUDGE HINKES: Yes, but your question is concerning what, now?

MR. STONE: Milk.

JUDGE HINKES: Well, what do you want to know about milk?

MR. STONE: I wanted to know if customers were generally familiar with milk prices.

MR. CURNIN: And I object to that question, your Honor.

JUDGE HINKES: Well, would you know, Mr. Lasorso, if your customers were familiar with milk prices?

THE WITNESS: I believe they would be, yes.

JUDGE HINKES: Now, why do you base -- on what do you base that answer?

THE WITNESS: Well, it's a commodity that they buy -- if they don't buy it every day, at least two or three times a week.

JUDGE HINKES: Yes, but what makes you think that they are familiar with the prices?

THE WITNESS: Well, it's an item that, like I said, that they buy -- it isn't an item -- like they'll buy coffee and say, "Well, I buy that in a two-pound can, it will last me for two weeks or one week", you know. I mean, it's milk. It's an everyday item, and they're more conscious of things they buy every day than they are of things that they buy once every two weeks or once a week.

By Mr. Stone:

Q Did customers remark to you as to the price of milk?

A No. We're pretty competitive on it. But, you know, they could tell us if somebody else ran it for, you know, they'd have a weekend special or something like that and we didn't have it, they'd say, "Well, I'm getting so and so", you know.

Q Mr. Lasorso, are you familiar with the term "leader" as it's used in grocery merchandising?

A Yes, sir.

Q And what does it mean?

A Well, it's -- you either advertise it as a leader, you can sell it for your cost or -- and leader is an item that everybody seems to want.

Q Would you use milk sometimes as a leader?

A Yes, sir.

MR. CURNIN: Objection, your Honor.

JUDGE HINKES: On what basis?

MR. CURNIN: Hypothetical. I think the witness should be asked if he did, and if he did during this year.

MR. SCHAEFER: That's right, your Honor. If the witness --

MR. STONE: I'll withdraw the question, your Honor, and substitute that.

By Mr. Stone:

Q During this period, Mr. Lasorso, did you use milk as a leader?

MR. SCHAEFER: During 1966?

JUDGE HINKES: That's the period we're speaking of now.

THE WITNESS: Yes.

By Mr. Stone:

Q Was milk used as a leader by others in this market area you've described during this period?

A Yes.

Q Now, Mr. Lasorso, what competive effect would it have had on your operation if you had been able during this period to get a better purchase price for milk and dairy products?

MR. CURNIN: Objection, your Honor. Hypothetical, conjecture, no testimony that he got a lower price, and I believe it would be -- this question came up yesterday and your Honor sustained the objection.

MR. SCHAEFER: The same objection for Borden.

JUDGE HINKES: I don't recall the ruling as you claim, Mr. Curnin.

MR. CURNIN: May we have a moment, then, your Honor, to look at the transcript?

JUDGE HINKES: If you can find it quickly, yes.

MR. STONE: I believe your Honor's ruling was yesterday that the grocery retailer had expertise in the area of grocery retailing, and that he was able to say whether or not it would have had an affect on his business if he had gotten a lower price.

JUDGE HINKES: Well, that's the exact opposite of what is being claimed by Mr. Curnin, so that's why I'm giving him a chance to show me what he claims in the transcript, because that would be my offhand reaction at this time to allow this man, who is knowledgable in the grocery business, to give his opinion on costs, which is what he did a moment ago, as a matter of fact, without objection. Just a few minutes ago in his testimony he stated that cost is important, it's important to buy right, if you remember, that's the expression he used, and now he's being asked once again for the importance of his costs.

MR. CURNIN: Well --

JUDGE HINKES: And there was no objection raised at that time, but nevertheless, you may raise that objection at this time and I'll make my ruling.

MR. CURNIN: Well, it may be, your Honor, then, that the -- they're seeking cumulative testimony.

JUDGE HINKES: Well, let's take all the objectio at one time, please. I don't like these interrupted objections, and we're not really moving expeditiously this way.

I don't think that two questions are necessarily cumulative. I could see where perhaps a half dozen questions along the same line -- and that, I'm afraid, some of us have participated -- would be cumulative.

MR. MC INERNEY: I think the reference, your Honor, is Page 260 to 62 --

JUDGE HINKES: Pages what?

MR. MC INERNEY: Sorry. 2460 to 2462 of the transcript. I have not had a chance to read it myself.

MR. CURNIN: Now that we have located it, your Honor, may we have a moment to read the transcript of these pages?

JUDGE HINKES: Yes.

MR. MC INERNEY: Your Honor, we correct that. I think that there was a question similar to the one that is now being asked, and -- back at 2458 of the transcript. I think that in order of fairness to Mr. Stone and his question, your Honor would have to read 2458 through 62 of the transcript.

MR. STONE: I would disagree, your Honor. I believe that I asked a question which was almost precisely the same as that asked on Page 2458 and on 2459. After some colloquy, your Honor remarked "The objection is overruled."

1500 MR. MC INERNEY: Well, that was my point, your Honor. There was a question similar to the present one, and objection was made. That objection was overruled. There was a follow up question of a similar nature, and your Honor sustained the objection. I was only trying to be helpful, Mr. Stone.

JUDGE HINKES: I allowed the question concerning the witness' experience or opinion of a lower cost and its effect on his prices. That was the discussion concerning the admissibility -- admissibility of an answer on 2458.

MR. MC INERNEY: Yes, sir.

JUDGE HINKES: The issue, however, at 2462 was a little different. There the witness was being asked about the competitors' reaction.

MR. MC INERNEY: That's what I wanted to point out, your Honor.

JUDGE HINKES: And if the question is limited to that competitor, I said he is not an expert with respect to competitors, he is an expert in his own business and not how his competitors would react to a lower cost, and I sustained the objection to that.

MR. MC INERNEY: Yes, your Honor.

JUDGE HINKES: Now, state that question that you have of this witness once again.

MR. STONE: Would the reporter please read it back?

(Last question read.)

JUDGE HINKES: The objection is overruled.

THE WITNESS: You want me to answer that?

MR. STONE: Yes.

THE WITNESS: Let's see, I forgot the question.

(Question reread.)

THE WITNESS: Whatever we could have saved, we'd pass it on to the customers, and if we ran a sale or anything, it would be an advantage for the customer, and plus if we didn't, we would have more money in our till.

By Mr. Stone:

Q Now, Mr. Lasorso, I believe you've already testified that during this period you purchased your milk and dairy products from Borden.

Did you purchase milk and dairy products from any other dairy at this time?

A No, sir.

Q At this time, did you receive a rebate from the Borden Company?

A Yes, we did.

Q And how often was this rebate paid?

A About once a month.

1502

Q And if a rebate was paid for a month, when would that rebate be paid?

A Well, the next month, it would be paid within a week to ten days, sometimes longer, but mostly in about a month's time.

Q Now, Mr. Lasorso, how would this rebate be calculated?

A At the list price.

Q On all products?

A On all products.

Q So was it an across-the-board rebate?

A Yes.

Q And was it a percentage rebate?

A Yes.

Q Mr. Lasorso, did you receive more than one rebate check on your purchases of milk and dairy products per month during this period?

A Just one.

Q Did you also purchase ice cream from Borden?

A Yes, I did.

Q And did you also receive a separate rebate check for those, on those purchases?

A Yes.

Q And was that rebate check larger or smaller than that --

MR. CURNIN: Objection, your Honor, --

and get substantial monies or equipment.

By Mr. Curnin:

Q You mentioned, sir, that you had been approached during this period of time by other dairies.

A Yes.

Q What dairies contacted you during this period, 1966 to '70?

A I think it was Deans.

Q And do you recall when that was, sir?

A Not exactly the date. Sometime in that.

Q Do you recall if it was in 1966?

A No, I don't think so, because we just had started more or less with, with Bordens.

Q I thought your testimony was, sir, that you opened in 1963, '63, --

A Three, yes.

Q -- '64?

A Yes.

Q And that you opened with Bordens at that time.

Now I am asking you generally about a period two years later; would it have been in 1966 that you were contacted by the Dean milk company or maybe the name is Dean's Foods.

A No, I really -- I couldn't swear to the time, but they were there sometime, I don't remember when exactly.

Q And what proposal did they make to you at that time, sir?

A Well, they offered me more rebate.

Q Higher than Borden?

A Right.

Q And can you tell us as best you can recall what was the rebate that you were receiving from Borden at the time you were approached by Dean?

A I believe it was 25.

Q And Borden was offering you 25 percent off list?

A Off list.

Q And what did Dean offer you off list?

A I believe it was about 27 to 29. I think we were bickering.

Q In addition to offering you a higher discount off list, did Dean offer you anything else?

A No.

Q During this discussion that you had with the Dean representative, did he tell you that they would also afford you regularly special promotions?

A Well, I only talked to them a couple of times, and it was -- I was very much satisfied with Bordens, and, I mean, when I heard I could get more from Deans, I called Bordens and their sales manager came out and he said he will see what he can do for me, and he brought up my percentage.

Q In other words, he matched the proposal --

A That's right.

Q -- that you had from Deans?

A (Nodding head.)

Q And it was at this time, then, that your discount off list was increased to 29 percent, or thereabouts?

A Yes.

Q Now, when the Borden representative increased your percentage, did he ask you for any proof of the proposal that had been made to you by Dean?

A No, he didn't.

Q During this discussion, or series of discussions that you had with Dean, did they offer you anything else for your business, such as did they say, "If you take on Dean milk we will give you some equipment for use in your store"?

A No, there was no mention about equipment.

Q Did they offer anything else to you, sir, of value, of any description?

A Not that I know of. They were just giving me -- their label was well accepted, Deans.

Q In your market?

A Yes.

Q Did you ever have occasion, during this period of in comparison to Jewel Tea in 1966?

A I think we were evenly priced, the same price.

Q Well, would it be your testimony that during the period 1966 you believe your prices were competative with A & P and Jewel on milk and dairy products?

A I believe so.

Q And does that mean as far as you can recall, sir, that the prices were the same?

A Yes.

Q During the period 1966 in your area, what was the most competitively priced milk package?

A Gallons.

Q And was that also the package in which the greatest quantity of milk was sold?

A Yes, that's the biggest one.

Q And at any time during 1966 were you approached by a dairy other than Borden, at which time they offered to sell you milk and dairy products?

A I said Dean's had approached me.

Q Anybody else in addition to Dean on the Dean label?

A I think Wanzer was -- Wanzer milk, Wanzer Milk Company.

JUDGE HINKES: You said that Dean approached you, but if I understand your earlier testimony, you weren't sure of the date, and now you're answering the question, and the question relates to 1966. Now, is that your testimony that it was Dean in 1966?

THE WITNESS: Well, I thought any period of time, but Dean was in the early part.

JUDGE HINKES: "Early part" meaning what?

THE WITNESS: 1965 or '66. And Wanzer was later, much later.

By Mr. Curnin:

Q Wanzer was beyond 1966?

A Yes.

Q And was the price that they offered to you better than the price that you were then receiving from Borden?

A I believe so on the basis of list price, but I didn't know what their list price was.

Q But you understood their price to be better than the Borden price?

A Well, I was more concerned with percentage of the rebate off the list.

Q Well, how were you judging the prices?

A Well, if I -- if I would have got the price list from them, you know, and then I would take Borden's and compare them, what's the use getting a bigger percentage back if You're paying more money for the milk?

Q I mean, is it your testimony, sir, that they offered you a bigger discount but you didn't know what that discount was going to be off?

A That's right.

Q Did you have any discussions with the man from Wanzer at that time that you'd like to know what that was and you'd be able to judge his price?

A Well, I tell you what, we just talked once, and I really wasn't interested in taking another dairy, because I had proven I had good faith in Borden's, and my customers accepted it, and I didn't feel as though I wanted to trade and start all over again trying to educate my customer to a new product.

Q And did you also feel that there would be a certain amount of trouble if you had two dairies supplying you?

A I really don't know if we would have trouble.

Q Having two dairies supply and dual billing and the like?

A I -- I never questioned that if we would have a problem or if we would split the stock.

Q Were you contacted by anybody else, sir, any other dairy during the period -- year 1966?

A No.

Q Now, were you a member of Grocerland in 1966?

A Yes.

Q Now, did Grocerland offer to its members a private label brand of milk?

sll

A No, they didn't.

Q Did they at any time in 1965?

A No, they didn't.

Q Did they offer a private labeled brand at any time during the period '66 to '70?

A No, they didn't.

Q They offered only what, the general Grocerland line, sir?

A Just the Grocerland.

Q You may have mentioned this before, sir, but would you tell me again the percentage of discount that you were receiving from Borden in 1966?

A I believe it was 25 percent.

Q And did it remain constant through the year or did it change at any time in 1966?

A I forgot exactly when it was changed, but it was changed to 29. I don't remember if it was the following year.

Q But it may have been in 1966 that it changed to 29 percent?

A It might have been. I'm not sure.

Q And this was a discount off the list price?

A Yes, sir.

Q Did you ever see a Borden discount schedule in 1966?

A I don't remember.

from the Borden Company on milk and dairy products?

A It happened.

Q Now, would you describe for us, sir, your store as it existed in 1966? For instance, how many square feet did you have?

A I had 5,500 square feet.

Q And where was your cooler located that you used to store milk, dairy products, and other things that required refrigeration?

A At that time we had a -- excuse me -- we had a cooler in back, but most -- all the milk went into my dairy case in the selling area.

Q It was delivered into the case by the Borden driver?

A No, it was delivered to the case.

Q In other words, he would wheel the milk through the store and he would stack it by the dairy case?

A He'd leave it there. We'd stock it.

Q No, but he would bring the milk in and deposit next to your dairy case?

A Right.

Q He did not deliver it to the cooler, although you had a cooler?

A (Nodding head.)

JUDGE HINKES: The answer is yes?

THE WITNESS: Yes. I'm sorry.

By Mr. Curnin:

Q At the time he delivered milk to your stores, did the Borden driver check your stock to determine if you had any out of date merchandise?

A Yes.

Q And would he remove that stock from the dairy case?

A Yes.

Q And would he also rotate some of the stock that was in it to be sure that the older dated merchandise was being brought forward?

A We usually took care of that. The only thing he'd look for was the out of code.

Q But were there occasions, sir, during 1966 when he assisted your dairy man or stockman -- I don't know how you describe him -- in rotating stock in your dairy case?

A Yes.

Q All right. In addition to checking stock in the dairy case and removing outdated merchandise, did the driver also prepare the order for the next delivery?

A Yes, but, now, say our -- we sold a hundred gallons of milk a day, his job was just to build it up to a hundred. If I sold 60, he would leave me 40. He knew better than I did, you know.

Q And because he knew better than you did and because he was checking your dairy case, he was the one who was making out the order?

A Right.

Q In addition to these visits, deliveries by the Borden driver, were you also visited by a Borden salesman during the course of 1966?

A Yes.

Q And for what purpose would he visit your store?

A Goodwill ambassador.

Q Would he also bring with him some materials, point of display type advertising which might be beneficial to you in the sale and promotion of milk and dairy products

A Yes.

Q When outdated merchandise was removed from your store by the Borden driver, would you get a credit for that merchandise?

A Yes.

Q In other words, Borden ran the risk of spoilage?

A Yes.

Q Were you advised by Borden at any time during 1966 that you would -- were entitled to receive or could receive an additional discount if you did the pre-ordering?

A It was never mentioned to me.

Q Did the Borden driver or any Borden representative at any time in 1966 advise you that you could receive an additional discount if you ran the risk of spoilage on outdated merchandise?

A No.

Q Now, the discount that you received during 1966, is it your testimony that that was an across-the-board discount?

A Yes.

Q On total dollar volume of milk and dairy products purchased?

A Yes.

Q Now, in addition, did Borden offer you, during 1966, specials on dairy items?

A Yes.

Q And the value of that would be what, five or ten cents an item?

A Depends what they were -- they had a program every week, they would run one particular item every week, and all the stores got that.

Q And this was of value to you in promoting the sale of dairy products in your store?

A Yes.

Q And the amount of the reduction, how was that reflected, in a lower net billing to you, or did ~~you~~ receive -- I mean, in other words, did you receive a credit?

A No. It would be -- they would -- on the net billing they would reduce the price on it. If it cost 42, and they gave you a nickel off, they charged you 37.

Q And that, a net charge was reflected in a reduction off the --

A List.

Q -- billing price?

A Right

Q They did not supply you with a check?

A No.

Q During the year 1966, did Borden supply you with certain items to decorate your store, such as balloons and streamers, and things of that sort?

A They only did that for a grand opening.

Q Just for the grand opening?

A (Nodding head.)

Q They didn't do it at any time during the holiday season in 1966 in connection with certain holiday promotions that they might be having?

A I don't think so.

Q Is it possible, sir, that that occurred during 1966, that such material --

MR. STONE: I'll object to speculation.

JUDGE HINKES: As possible as anything. Let's try to rephrase that.

By Mr. Curnin:

***

blrt18 he was making to reimburse Borden for these cabinets, if at all.

JUDGE HINKES: Well, that is not the issue. The issue is the connection between the payments and the cost of milk from Borden. That is the connection I am looking for.

I don't care to know the details of his payment on a freezer that is not involved in the milk sale or purchase.

MR. CURNIN: But the witness has testified, I believe, your Honor, that this is part of his over all dealings and his over all relationship with the Borden Company.

JUDGE HINKES: And that was not sufficient when you raised the objection to allow the question to go on.

No, I am going to sustain the objection.

By Mr. Curnin:

Q Is it true, Mr. Lasorso, that the net sales of Mayfair Foods in terms of dollars increased in 1966 over that which it had realized in 1965?

A I don't have the figures, but I know we did increase, but I am not sure if it was '66 or '67, but --

bl Q And did your gross profit in terms of dollars increase in 1966 over 1965?

lrt19 A No.

Q I show you these documents, Mr. Lasorso, and ask you if that -- these documents CX-184-B and sub parts 184-G sub parts refresh your recollection? In 1965 your company reported gross receipts six hundred one odd thousand dollars, less cost of goods, one hundred seventy-five odd thousand dollars, gross profit $126,000.

MR. STONE: Your Honor, I see no reason for reading these tax returns into the record.

JUDGE HINKES: The document, Mr. Curnin, is already in evidence, and if the witness has made a mistake, that can be clearly demonstrated.

Are you seeking an admission from the witness that he made a mistake? I don't quite understand it.

MR. CURNIN: Well, I just want to refresh his recollection, your Honor. He said that gross profits in terms of dollars did not increase in 1966 over 1965 based upon cost of -- gross receipts less cost of goods sold, and now I'm showing him the tax returns of the company to ask him if that refreshes his recollection that it wasn't otherwise.

THE WITNESS: Yes.

By Mr. Curnin:

Q Gross profits in 1966 in terms of dollars was higher than that of the company in 1965?

rt20 A Yes.

Q Thank you, sir.

To your knowledge, sir, did A & P's sale of private labelled milk and dairy products during the month of February and March 1966 injure your business?

A No.

MR. STONE: I object, your Honor.

MR. CURNIN: He's answered the question, your Honor.

MR. STONE: It calls for speculation.

JUDGE HINKES: Well, are you asking that the answer of the witness be stricken?

MR. STONE: Yes, your Honor. I see no probitive value.

JUDGE HINKES: Well, the witness is certainly an expert at his own business, and he has answered that certain behavior had no competitive effect on his business. To that extent, I think it's permissible as an answer. I'll overrule the objection.

MR. CURNIN: I have no further questions of this witness at this time.

JUDGEHINKES: Mr. White.

MR. STONE: Your Honor, might I inquire if that means that Mr. Curnin's cross examination is closed?

MR. CURNIN: Unless something comes up on the

21 basis of Mr. White's examination or any redirect by counsel.

JUDGE HINKES: I take it that when counsel tells me that he has no further questions, that's it, and he'll only be permitted recross at a later time under circumstances that warrant it.

Mr. White.

MR. WHITE: Thank you.

CROSS EXAMINATION

By Mr. White:

Q Sir, during 1964, '65, '66, during that period that you were purchasing milk products from Borden, did you from time to time receive from Borden price lists for those products, the prices you were being charged from which the discount was being calculated?

A Yes.

Q And those were normally mailed to you or given to you by the route driver?

A By the route driver.

Q This afternoon you told us about the incident where the Dean representative solicited your business and offered you a discount and it ranged from 27 to 29 percent, and that you then called Borden and explained this to a Borden representative; is that correct?

A Right.

Q Did you tell the Borden representative that Dean had offered you that discount?

A I believe so.

Q Did you tell the Borden representative the truth?

A Yes, I did.

Q Now, you've mentioned this Termis Liquor Store, I believe you said was the name of the store, which was in the same block that you were located.

A Across the way from me.

Q Did I understand correctly that this store in particular sold gallons of homogenized milk?

A Yes, sir.

Q And that was a large item in that store?

A Yes.

Q From your observation of your own customers and of being in that liquor store, was that liquor store selling a lot of milk?

A I believe so.

Q It was a very active competitor of yours in the sale of milk; is that correct?

A Right.

MR. WHITE: That's all, your Honor.

JUDGE HINKES: Any redirect?

MR. STONE: If I might just have about a half a minute to confer with counsel.

***

under "delivery expense" by Mr. Havemeyer, are you familiar with Mr. Havemeyer's method of allocation of this item?

A Yes, I am.

Q How did Mr. Havemeyer allocate such commission?

A He allocated these commissions as part of the delivery expense and the delivery expense was allocated on the basis of the time spent by the route man at the customer's place of business.

Q Now, was that the time it took him to serve ~~searc~~h each particular stop?

A That is right.

Q Now, Mr. Lemberg, do you agree with this methodology for the allocation of commission of route men?

A Now, I don't.

Q Why do you disagree with it?

A I disagree with it because the commissions were not earned, expenses not incurred on the basis of the deliveryman's time with the customers.

Q How was this particular cost or expense incurred?

A It was incurred as a commission based on the product delivered, on the points of the product delivered.

Q Was it based on the volume delivered?

A Yes, it was.

Q Did this have any relationship to amount of time the drivers spent in the store?

11 Maybe it would be clearer if I rephrased. What effect would your criticism have on Mr. Havemeyer's allocation of commissions of route men?

THE WITNESS: Well, obviously the allocation of commissions on the volume basis would remove any cost difference between customers.

By Mr. Mathias:

Q Now, Mr. Lemberg, are you familiar with the manner in which Mr. Havemeyer allocated vehicle or truck expense?

A Yes, I am.

Q And how did he allocate this expense?

A He allocated it as a part of the delivery expense. And this again, the delivery expense being allocated on the basis of delivery times.

Q By "delivery times," you mean the time the driver spent at the store?

A Yes.

Q And do you agree with this allocation method?

A No, I don't.

Q Why not?

A The expense of the truck, cost of the truck, is not related to the time that the driver spends at the store. It is rather related to the load carried, the miles driven, and factors of that kind, and therefore, in other words, the truck is used merely to bring the product to the store and therefore it

12 should be equally allocated to each unit of the product.

Q Alright, so what effects would this criticism have on Mr. Havemeyer's allocation of this particular expense item?

A Again, this would remove any cost difference in the allocation of the costs.

Q Now, sir, are you familiar with the method in which Mr. Havemeyer allocated building expense as a part of the delivery expense?

A Yes, I am.

Q And how did Mr. Havemeyer allocate this expense?

A It was included in the delivery expense and then, of course, allocated to customers based on delivery time.

Q This is again the time the driver spent at the store you are talking about?

A Yes.

Q Now, do you agree with this method of allocation?

A No, I don't.

Q Why not?

A Because this cost is in no way related to the driver's time at the store and further the building cost is not necessarily related even to the delivery cost, because there are other activities going on for which the building is used, such as the loading, storage of the milk, housing the office, the clerical staff, sales forms, items of that kind.

Q How should this expense have been allocated then, sir?

A Well, it should have been allocated, first, to these various functions and then allocated with those functions rather than in total with the delivery expenses.

Q Now, sir, are you familiar with the manner in which Mr.--

JUDGE HINKES: What would be the end result then of this difference?

THE WITNESS: It would change the amount of delivery costs for one thing. Now that portion which is allocated as part of the loading costs, storage of the milk, would then create or wind up with no cost difference between customers, because that is not dependent on delivery time and, of course, that part relating to the clerical expense, and there is one other expense that is involved here which would be the vehicle servicing for which the building is also used.

By Mr. Mathias:

Q So, could you tell accurately just from this record as it stands just how this expense should be allocated?

A No, there is no matter that will allow me to say how much of the building should be allocated to any particular function.

Q In that case, do you think it is proper to allocate at all to the delivery function?

A No, I don't think so.

Q Why not?

A Because that would, or actually that would be using or creating a maximum price, or cost difference. If we must

14 allocate it, then I think we would be better off, it would be a much more accurate result if we use some arbitrary basis perhaps, or if you can't allocate it, could find no basis, then perhaps we should not try to create a cost difference at all.

Q Now, sir, have you, or are you familiar with the manner in which Mr. Havemeyer allocated loading expense, that is expenses of loading trucks, at the branches, prior to delivery.

JUDGE HINKES: May I come back to your last series of questions first.

Mr. Lemberg, if I understood your testimony, when you spoke of the commissions of route men and of vehicle expenses, you didn't object to the allocation of these costs to delivery expenses but to the method of allocation, that is, you thought it was wrong to allocate it on the basis of time spent?

THE WITNESS: That is right.

JUDGE HINKES: Now, in the case of building expense, if I understand your testimony, you think it wrong to allocate it to delivery expenses exclusively regardless of how it is done?

THE WITNESS: Yes.

JUDGE HINKES: It should be allocated to various functions that are involved in building expenses such as, you mentioned, I think, storage and so on?

THE WITNESS: Yes, that is right.

JUDGE HINKES: Very well.

15

By Mr. Mathias:

Q One further question along that line, Mr. Lemberg. In the case of building expenses, in your opinion, would any of this expense be properly allocable on the basis of the time the drivers spent in the store?

A No, I would not think so.

Q Why?

A Because the cost of the building, the expenses of the building are in no way related. They are not going to increase or decrease in relation to the time that the driver spends at the store.

Q Now, sir, are you familiar with the manner in which Mr. Havemeyer has allocated loading expenses, that is, expense of loading trucks at the branches prior to delivery?

A Yes, I am.

Q How has he allocated this expense item, sir?

A He has allocated it by using the product mix that is delivered to the customers.

Q In other words, he has based it on--

A Basically, he developed a cost per case, but then, due to the fact that each customer, according to his method, has a different product mix, each customer has a different number of points per case; therefore, he developes a different cost per point.

Q Do you agree with this methodology, sir?

A Yes, I am.

MR. FALLS: John, when you talk about "selling expense," are you not talking about branch selling?

MR. MATHIAS: Yes, talking about branch selling, the category used in -- one of the main sub-categories of cost justification which Mr. Havemeyer used in each of his basic studies was selling expense, I believe that was the branch selling expense.

By Mr. Mathias:

Q Are you familiar with the manner in which Mr. Havemeyer allocated branch selling expense?

A Yes, I am.

Q How did he allocate such expense?

A He allocated these expenses to certain of the wholesale customers on the bases of the volume of their purchase.

Q And did these certain wholesale customers include A&P?

A No, they did not.

Q Did they include non-store customers?

A No, just the store customers.

Q Do you agree with this methodology, sir?

A No, I don't.

Q Why not?

A Well, there are several reasons. A good bit of this, perhaps the major part of this selling effort, the main focus of the selling effort was actually to acquire new business rather

20

than to call on existent customers and to that extent--

MR. FALLS: Object to that, John, on the basis there has been no showing that this witness knows how that selling effort was directed.

JUDGE HINKES: Well, if you can establish--

MR. MATHIAS: Really, it as question of cross-examination, Your Honor. The witness has testified he reviewed the record in connection with the service and function of Borden, and he is familiar with the manner of allocation and methodology used by Mr. Havemeyer and I believe it is properly then a matter of cross-examination rather than one of objection.

MR. FALLS: I think not, Your Honor. I think Mr. Havemeyer's testimony, the line was carefully drawn between the things Mr. Havemeyer had knowledge about and the things he didn't. When he purported to talk about something when he couldn't point to some source of information, he was generally cut off.

JUDGE HINKES: Well, let me find out just exactly what the witness proposes to base his answer upon. On what reasoning or facts do you base your statement, Mr. Lemberg, that the focus of selling is directed to acquisition of new business?

THE WITNESS: I base this on the testimony of one of the witnesses and I can't at the moment recall just which one it was.

JUDGE HINKES: But it is record evidence in this proceeding?

THE WITNESS: Yes.

JUDGE HINKES: I see. You don't remember which one it is at the moment?

THE WITNESS: I am not positive. I think perhaps it was Gordon Tarr.

JUDGE HINKES: Very well, you may continue, Mr. Mathias.

MR. FALLS: Your Honor, it seems to me that this witness cannot appropriately answer. Whatever is there, is there.

JUDGE HINKES: Well, he is not adding to Mr. Tarr's testimony. What he is saying is his accounting expertise, now based upon Mr. Tarr's testimony, results in certain conclusions. He is not adding to Mr. Tarr's testimony.

MR. MATHIAS: I might note the witness said he thought it was Mr. Tarr, but he has stated there was some testimony in the record that supported this idea.

JUDGE HINKES: I will admit the Lemberg testimony at this point. It should be and hopefully based upon the record that has been made in this proceeding. His testimony is not being received to supplement that testimony. More, it is being received to arrive at certain accounting principles based upon that testimony, which, in his opinion, are more nearly in accord with accepted accounting principles than what has been suggested by other witnesses in this proceeding. To that extent, I think it is perfectly allowable. You may proceed, Mr. Mathias.

By Mr. Mathias:

Q Mr. Lemberg, you were discussing the main focus of the selling expense was the obtaining of new business and continue from there, please.

A That being the case, that portion of the selling expense should be borne by all customers. It is a general business expense and it cannot properly be charged to any one class of customers.

Now, then, the balance, or that portion which can properly be charged to the Borden wholesale customers should not be charged on the basis of the volume purchased by the customers, because that is not the way the salesmen spent their time.

It would -- well, that is all.

Q And how did the, or what do you mean that that is not the way the salesman spent his time?

A Well, there is no -- I might, sorry, strike that. The salesmen made periodic calls on customers, but there is no showing that this was in relation to the product brought by the various customers. So, therefore, the purchase ~~, the~~ volume is not a proper basis for allocation.

1530

23

Q How would you allocate this portion then?

A I would allocate it on a basis of the salesmen's time spent with customers, the number of calls, the number of hours or whatever basis might be available.

Q And I believe you stated that the main portion of this expense you would allocate evenly among all customers as a general business expense. Now, sir, what would the effect of this criticism be on the amount of price difference found by Mr. Havemeyer in his allocation?

A Well, that portion which is a general business expense would not create a cost difference.

Q Now, sir, in your opinion, is there evidence in this record of some expenses that were incurred by Borden for A&P but not for the unfavored competitors?

A Yes, there is.

Q What are those expense, sir?

A There is a certain amount of expense involved where Borden officials spent their time with A&P, or on the A&P business, for example, Gorden Tarr, Malone, another official by the name of Gose, spent considerable time on the A&P account. This should have been charged then directly to the A&P business.

Q Are there any other items of expense of this nature that you can recall?

A There is some expense involved somewhere in segregating the A&P product, with respect to delivery, the loading and

24

delivery, which had not been taken into account, and in addition there are other areas in the manufacturing area. Some of these products were not a very high volume item and there would likely be expenses there in running two lines of products instead of just one.

Q Are there any other areas in this case which, in your opinion, should have been studied and the possibility, on the possibility there may have been additional expense in servicing A&P that did not exist in Borden dealings with competitors?

A There is another area involved in, for instance, the central billing activity, in keeping or accumulating the A&P records and consolidating them into a bill for A&P, which was not done for the other customers.

Q Now, sir, in your opinion, is it necessary in a cost justification study under the Robinson Patman Act, to make a special study of any countervailing costs that may have been incurred for the favored customer only?

A Yes.

MR. FALLS: I object on the grounds I think the phrasing of the question calls for a conclusion of law as to what the Robinson Patman Act requires.

MR. MATHIAS: This is an expert witness and we asked for his opinion based upon years of dealing with this type of cost study, what is necessary. Now, there maybe a mixed question of law and fact here, but I certainly believe it is within his expertise and even if it should be considered a conclusion of law, I believe it is the type of conclusion of law that Your Honor might wish some expert advice and guidance on.

MR. FALLS: Could we have the question read back?

JUDGE HINKES: Read the question back, please.

(The reporter read the question, as requested.)

JUDGE HINKES: I think that the witness should be permitted to answer that question as an expert in the accounting field and in line with his experience in Robinson Patman proceedings. That will not call for any legal conclusion. His experience and his opinion as to the relationship to Robinson Patman may be a legal conclusion but as such, it is not necessarily tied to my decision, but I am interested in his opinion from the accounting standpoint and for that I think his expert opinion is necessary. You may answer.

THE WITNESS: Yes, I think it is necessary to study these costs.

By Mr. Mathias:

Q Why, sir?

A Because if we don't do this, we are not going to arrive at a true cost difference.

Q Now, Mr. Lemberg, have you reviewed the manner in which Mr. Havemeyer has allocated labor fringe benefits in his allocation of delivery costs?

A Yes, I reviewed that.

***

ms-5

manner in whcih the compensation package of routemen is negotiated or arrived at?

A Any specific knowledge of the way ---

Q Do you know anything about that? Have you studied that?

A No, I have no particular knowledge of the Chicago market or labor market or whatever.

Q And one other detail, is the commission payable to the Borde employees about whom we are concerened here on a straight volume basis, that is a commission for each point delivered?

A I am not quite sure whether it is or not.

Q You don't know?

A I am not sure that is right.

Q Do you know whether every point on which a commission is payable is entitled to the same commission?

A I have no information as to differing commission rates.

Q Now, isn't it the fact, Mr. Lemberg, that salesmen's commissions or deliverymen's commissions are frequently allocated by cost accountants on a time basis?

A It could be. Circumstances might permit that in some cases.

Q Well, you know in fact that it is sometimes done, don't you?

A I have seen it done, yes.

Q And Isn't it the fact, Mr. Lemberg, that in an industry where the salesman or deliveryman is essentially an order ns-6

taker, it is an accepted principle to allocate his compensation on a time basis?

A It might be done that way on occasion. I don't know that it was a general practice, though. It might be allowable at times, but I really wouldn't want to say it is a general principle, though, or a general practice.

Q Well, is it a principle frequently applied?

A It has been applied, yes.

Q Let me ask you, Mr. Lemberg, in the Beatrice Case before Examiner Lipscomb, whether you were asked this question and gave this answer. "If you are in an industry in which the salesman basically is an order taker, what are the generally accepted principles of allocating his compensation?"

"Answer: Well, in many instances salesmen's costs are allocated on a call basis or time basis, that has been done."

Do you want to see the transcript?

MR. MATHIAS: Yes, may we see the transcript.

(Document handed to Mr. Mathias.)

MR. MATHIAS: I believe line 7 was the beginning of the quote that Mr. Falls read to you.

(Document handed to the witness.)

By Mr. Falls:

Q The question at this point is were you asked that question?

A Yes.

-7

Q And you intended to give a truthful answer when you gave that testimony, did you not?

A Oh, certainly.

Q Are you familiar with a book called "Distribution Costs" by Heckert and Miner?

A I can't say that I am.

Q You don't know the book?

A No, I don't.

MR. FALLS: May I have the transcript back, please?

JUDGE HINKES: Let me ask you, Mr. Lemberg, from an accounting standpoint, regardless of the nature of the business, where a salesman takes orders would it be proper to allocate the cost of his work according to the time spent on different classes of customers?

THE WITNESS: Rather than on individual customers?

JUDGE HINKES: No, rather than on the volume.

THE WITNESS: Yes.

JUDGE HINKES: Would the converse be true? Would it be proper to allocate his costs on the basis of volume to these different classes of customers rather than time spent on these different classes of customers?

THE WITNESS: Only if his time and effort were proportionate to the volume. In other words, commissions could properly be allocated on a time effort basis if they approximated -- in other words, if they would approximate the

-20

A That is right.

Q Now, could you explain for us a little bit what you mean when you say that the expense related to the mileage driven -- first of all, what proportion of the expense of operating the truck do you think is related to mileage driven?

A I don't know. I merely cite that as these are the factors that would incur truck expense. They are related to the mileage and the load.

Q Now, if you could identify that part of the truck expense that is related to mileage driven or that varies with mileage driven, how would you allocate that among customers?

A I don't think we could allocate that to differentiate between customers because the allocation to a customer would be fairly arbitrary. Maybe we would say accidental, depending to where he happened to be on the route as to the amount of mileage incurred for any particular customer.

Q Well, in, for example, the A&P Exibit 232 profitability study, it was necessary to allocate all the costs on some basis because what we were determining was total cost to compare with total revenue to get an anticipated profit so that I assume you will agree with me in that kind of a study you have to make some disposition of all cost.

A Of course.

Q Now, in that study how do you think that the vehicle

ms-21

should have been allocated?

A Well, this should be treated as the cost of getting the product to the customer and that is where the cost would end. It is a matter of strictly a delivery cost and it does not create in my mind a difference between one customer and another ---

Q Well, in the profit ---

A --- except to the amount that the customer benefits, if we want to go back to that term, only in relation to the amount of product delivered to him. And he is responsible, using the other criteria, he is responsible for that cost incurred in bringing the product to him.

Q I am not sure you have answered my question as to how do you think the cost should have been allocated in the profitability study, remembering that this is not a study that has to do with cost differentials between customers, but merely the assignment of cost to the private label items delivered to A&P.

Now, how would you determine how much of vehicle cost was assigned to that product?

A Well, I think I alluded to that yesterday, that the vehicle cost would be allocated on a per unit of product.

Q And essentially on a volume basis?

A Yes.

Q Well, the mileage doesn't depend on the volume carried,

1538

ms-22

does it?

A No.

Q Wouldn't it be appropriate then if you could identify the cost relating to mileage to allocate it on some other basis since it clearly doesn't relate to volume carried?

A Well, generally the mileage cannot be allocated to different customers because it is sort of an accidental thing really.

If you are on the route East to West you get one mileage, portion of mileage per customer, and if you run it from West to East you would come out with something entirely different because of thelocation of the customer, so it is just a general expense which is related to getting the milk out to the customer and relates to the product generally.

Q In other words, you can't relate the miles driven to particular customers, is what you are saying?

A Yes.

Q Well, isn't it sometimes done in a situation like that to allocate, let's say, the driving expense, the mileage expense, the expense associated with mileage on a stop basis?

A I see no real basis for that because mileage is not, again, is not related to the number of stops.

Q Well, it is also not related to volume, right?

A Well, it is incidental to the volume because the product

ms-23

has to be hauled around the route.

Q But the mileage driven is exactly the same whether you drop off 100 cases at each stop or 500 cases at each stop.

A That is true.

Q So the mileage is not related to volume.

A Not in that sense. But it is related to the product that is carried on that truck.

Q Is it any more arbitrary to allocate that expense on a stop basis than on a volume basis?

A Yes, I think it is.

Q Why do you say that?

MR. MATHIAS: Your Honor, I believe it is arguing with the witness. I think we have covered this point. I don't see what can be gained by an argument.

JUDGE HINKES: I think the witness has already explained why he said it. I don't think there is any point in repetition.

MR. FALLS: All right.

By Mr. Falls:

Q Now, you say that you would allocate this on the basis of volume, you think that the truck cost is better related to volume than anything else you can think of.

A Yes, that is my opinion.

Q Do you know whether the trucks on these routes were fully loaded, that is, whether these had products stacked

ms-24

right up to the roof?

A I have no idea.

Q Can you explain to us the manner in which changes in volume in your opinion change truck costs? I think you seem to say that truck expenses are somehow related to volume. In your opinion, do the truck costs vary in any very direct way with volume?

A I think they are related to volume because if you are operating a route with only half loads I am sure that the truck would last longer than if you consistently carried a full load or even an overweight load.

Q Have you made any study to determine the amount by which the depreciation of a truck, a dairy delivery truck, is affected by the volume carried?

A No, I have not.

Q Do you have any basis on which to express an opinion that the life of a dairy truck is appreciably shortened by increasing the volume carried in it?

A I have no data on that. It is just my general impression that that would be the case.

Q There are also many expenses associated with operating a truck that have nothing to do in any stretch of the imagination with the volume carried, isn't that right?

A Oh, yes.

Q Could you name a few?

ms-25

A Insurance would be one. No doubt licenses.

Q Taxes?

A Taxes.

Q Those certainly are not affected by the volume carried in the truck.

A No, they are fixed cost on an annual basis.

JUDGE HINKES: Wasn't one of the general criteria for allocation of costs the consideration that should be given to the benefits obtained by the customer?

THE WITNESS: Yes.

JUDGE HINKES: And on that basis would not volume be an appropriate method of handling?

THE WITNESS: That would in this case appear to be the most appropriate or practically the only basis because the benefit to the customer is the product delivered to him, the benefit he gets from the truck operation, so the customer getting twice as much product is going to get twice as much benefit.

JUDGE HINKES: Well now, considering the customer benefit point of view would there be some reasonable basis for allocating costs on the basis of time spent?

THE WITNESS: Truck cost, you mean?

JUDGE HINKES: Yes.

THE WITNESS: Very little basis. It is a rather tenuous connection at best. There is a possibility that there

1542

s-26

might be some slight cost involved with time.

JUDGE HINKES: No. I am speaking now of customer benefit. What customer benefits could follow on the basis of time spent with that customer alone?

THE WITNESS: I don't know of any benefit to the customer by having the truck spend more time at his place of business.

By Mr. Falls:

Q Isn't one benefit of having the truck spend more time at his place of business is because it permits the routeman to spend more time at his place of business doing the things that he likes to have the routeman do?

A Yes, but we are working that one backwards, though. The time the truck spends there is not the causal factor of this. The routeman's activities caused the truck to remain there longer and not the truck remaining longer allows the routeman to be there longer.

Q Well, if the truck didn't remain there he couldn't be there long enough to do the things he does, could he?

A But he is the one who dictates how long the truck stays there.

Q Unless maybe he took a helper along. Then you would have to pay a helper, right? So, my understanding is that you would allocate no part of the vehicle cost on the basis of time.

ms-27

A That is right.

Q Let me give you an example, Mr. Lemberg, and ask you how you would treat that situation. Let us suppose that you have 11 stores, each of which receives the same volume of delivery on a given day. ~~Then~~ Ten of those stores have such limited service that they can be handled by a single truck who delivers the product to each of those ten stores. The 11th store has such full and complete service that the truck can deliver product only to that store in a day, so that on the one hand ten stores are served by one truck and on the other hand the other store is served by a truck who can devote all the day's time to that store.

Do you think in that situation time spend should be taken into account in allocating the vehicle expense?

MR. MATHIAS: Your Honor, I am going to object to an improper hypothesis. There is absolutely no relationship to that hypothesis in the facts of this case.

MR. FALLS: I think it is an illustrative hypothesis to examine the application of Mr. Lemberg's principles.

JUDGE HINKES: I will allow it.

THE WITNESS: It would seem to me we have injected a new factor into the thing now because now you say we have a truck that serves only one customer and that the customer's demands require that he have his own deliver service.

I think that is an entirely different situation.

ms-28

By Mr. Falls:

Q Let me ask you in that hypothetical would you not take account of the difference in time spent in allocating --

A In that sort of a situation I think you would, because there we have different benefits to the customer. He is benefiting because he is demanding a truck all of his own for delivery.

Q Well, let me give you another hypothetical then. Let us suppose again ten customers, all of whom receive the same volume and who receive limited service so one truck serves them, and suppose we have ten other customers who require somewhat fuller service so that as among those customers who take the same volume only five can be served by a truck in one day. So that there you have two trucks, one of which serves five customers and one truck serving the other ten customers.

Now, do you think there should be any difference in the allocation of vehicle costs as among the ten customers served by one truck and the other ten customers who collectively require two trucks?

A Well, if we now were trying to determine relative cost as between the two groups of customers I think we would then have to take that into account.

Q Well, suppose you were attempting to determine relative costs as against one of the customers in the group that

ms-29

required two trucks and one of the customers in the group that required only one truck. Wouldn't you take time into account?

A Yes, in that sort of situation you undoubtedly would because actually the service factor is different there, but we really don't have that situation here.

Q You say we don't have that situation here. Doesn't the evidence in this record show that A&P stores received fewer services requiring less time than many, if not all, of the complaint customer stores?

A Not all of the complaint customer stores.

Q Well, some of them. You would agree at least some of them.

A There is a time difference.

Q There is a time difference and if it is appropriate to take account of the time difference in the hypothetical I gave you, why isn't it appropriate to take account of the time difference here?

A Well, in this case we are serving the A&P stores off of the same truck, off of the same route. Your hypothetical indicated an entirely separate situation as between one route with five customers and another route with ten.

Q Let me give you this hypothetical. We have a truck that spends all morning serving one customer and the afternoon serving five customers and each of those six customers takes

-30

the same volume, wouldn't you take that time difference into account in allocating vehicle cost?

A I don't think I would.

Q You wouldn't?

A No.

Q So the whole thing hinges on whether you serve them with different trucks or the same truck?

A Well, this is an extreme characterization of it.

Q It is sort of a strange result.

A Yes, but it is a very strange hypothetical situation, too.

Q A strange result, though, isn't it?

A Yes, it is.

Q Now, Mr. Lemberg, isn't the allocation of truck expense on the same basis as salesmen's compensation expense a generally accepted accounting technique?

A It is one of the methods used and it is perfectly proper under proper circumstances.

Q It is a recognized method?

A Yes.

Q You said yes.

A It is a recognized method under the proper circumstances.

Q And indeed you have so testified in prior cases, have you not?

A Yes, I probably have. I don't recall.

s-31

Q Isn't it the fact, Mr. Lemberg, that the number of trucks that a dairy company has to purchase and operate depends in large part on the amount of time that the truck has to spend at each stop?

A That may well be.

Q Indeed, again in the Beatrice Case were you not asked the following question and did you not give the following answer:

"Question: Wouldn't the number of trucks that a dairy has to purchase depend in large part on the number of stops that the dairy is servicing and the number of stops assigned to each route and the amount of time that the truck has to spend at each stop?

"Answer: I would think so assuming that each truck is able to carry enough product so that that would not be a limiting factor."

Were you asked that question and did you give that answer?

A Apparently I did.

Q And did you attempt to give a truthful answer?

A Oh, yes.

Q Now, is there not evidence in the record in this case that with respect to the Borden situation involved here the time spent on the routes was the limiting factor in determining how many routes had to be operated?

A I don't recall that evidence. The only thing on that line, it is my understanding that the driver made only one trip and when he finished his route he was through for the day.

Q Are you familiar with the testimony of Mr. Pergler in this case after the introduction of private label program it gave Borden the opportunity to reduce the number of routes from 20 to 13?

A I have read that, yes.

Q And wouldn't that suggest that a reduction in the time spent was related to the number of trucks that had to be operated?

MR. MATHIAS: Your Honor, I am going to object unless that entire portion of Mr. Pergler's testimony is referred to. I believe it is quite improper because Mr. Pergler very definitely stated that this was due primarily to the fact that many, many extra services that they were granting to A&P prior to the contract were eliminated and that these were extra services peculiar to A&P.

MR. FALLS: That is exactly my point. I think you stated it very well, Mr. Mathias. I will withdraw the question.

By Mr. Falls:

Q I am going to pass to another subject now, Your Honor.

Now, Mr. Lemberg, another subject on which you testified s-33

was the allocation of building expense. Do you remember that?

A Yes.

Q You testified that you didn't think that it should be included as a part of the delivery cost.

A Well ---

Q I think that is what you said. Correct me if I am wrong.

A The testimony I think was that not all of it should be included as part of the delivery cost.

Q But you think it would be appropriate to include some of it?

A Some of it perhaps but certainly not all.

Q Now, on the basis of your examination of the information in this record, is there information available which would permit you or anyone else to allocate that building expense among the various functions that you think it might relate to?

A There is no specific information. There is no way to do it precisely.

Q What are the functions or activities to which you think the building expense should be related?

A Whatever activities, functions, are performed at the branch which I assume was the branch building.

Q Would you identify them.

ns-34

A These of course would include the receiving and storage of the milk, the loading operation, undoubtedly some part of the building is devoted to the storage and maintenance of the trucks, any clerical function there.

I assume that the sales operation is conducted from the building, was headquartered at the building. That may be all. I can't think of any other at the moment.

Q There probably was some space in the building that was used by or provided for the routemen, wouldn't you suppose?

A Possible.

Q I suppose the only way in which you could make the fine allocation that you are talking about would be to have some information as to the dimensions and use of all of the areas of the building; is that right?

A If you wanted to make a precise allocation, that would be necessary.

Q And without such information you could not allocate these costs to all of those separate functions?

A Not precisely.

Q You would do it purely arbitrarily, wouldn't you?

A Either arbitrarily or perhaps you could get some data on which to make estimates.

Q Do you know of any such data that would permit the making of such estimates?

35

MR. MATHIAS: Your Honor, is he asking now in the record or in existence anywhere?

MR. FALLS: In existence anywhere.

MR. MATHIAS: Your Honor, the witness has only testified on the basis of his review of this record. The basis of his testimony was that he had reviewed this record and the cost computations with Mr. Havemeyer and I think this is beyond the scope.

MR. FALLS: Let me ask the witness the question.

By Mr. Falls:

Q Do you know anything about this Borden operation other than what you read in the record?

A No, I don't.

Q So of necessity the only information you have is what you gleened from the record?

A That is right.

Q You never went there, did you?

A No.

Q I think the question was do you know of such data in the record that would permit the making of such estimates?

A Well, I have not studied it in that detail. It is possible that our data in the record, if correlated, would enable one to make estimates, but on the other hand there are probably other basis that might be just as good.

At any rate, there is no way to make a precise allocation to the different functions.

Q Well let me ask you this now. If there was some space in the building that was associated with the routemen, either as offices or as places for them to dress and so on, that expense I take it could probably be allocated perhaps in accordance with the allocation of the routemen's salaries?

A I think that would be permissible, yes.

Q And in effect that part of the building would be allocated? Pretty much the same way that Mr. Havemeyer did allocate it; isn't that right?

JUDGE HINKES: You mean by time spent?

MR. FALLS: Ultimately by time spent.

THE WITNESS: Yes, I think that would be all right.

By Mr. Falls:

Q Now, if there was some part of the building associated with the selling operation, the salesmen as opposed to the routemen, branch salesmen, I take it that that would appropriately be allocated along with the salesmen's compensation, would it not?

A Yes.

Q And in Mr. Havemeyer's study the selling expenses, the expenses of the salesmen, were allocated entirely to the complaint customers with none of it being allocated to A&P; is that right?

A I believe that is right.

A That is right.

Q I take it one of the reasons for that difference is, is it not, that the complaint customers, many, if not all of them, took glass, took milk in glass gallons, which A&P did not?

A I don't know if that related to all customers or not but if they did, that would account for some of the difference.

Q If one customer takes glass and one doesn't, that means there will likely be a difference in the number of points per gallon per case?

A Yes.

Q Because you get fewer points per case in glass than you do in paper. Is that not right?

A That is right.

Q Lets turn to a different matter. Customer Branch Selling Expense.

You indicated, on your review of the record, you felt, at least some part of Branch Selling Expense was attributable to the solicitation of new accounts. Is that right?

A Yes.

Q Do you know, or is there any way of determining, from this record, what proportion of the selling expense was attributable to the solicitation of new accounts?

1554

9

A There is no information as to the specific amount or proportion.

Q It is true, is it not, that the record clearly shows that some part of the selling expense was spent on the solicitation or visiting of existing accounts?

A Yes.

Q And the record also shows, does it not, through the testimony of the complaint customers, that all or most of them were visited on a regular basis by branch salesmen?

A Yes.

Q So it is clear that some of that selling effort was directed to the complaint customers?

A Oh, yes.

Q And to the extent that the selling effort was directed to the complaint customers, they should be charged with the cost of that effort, is that not right?

A That is right to the extent it was directed to them.

Q And if that selling expense was not allocated to them, the cost comparisons would, to that extent, be inaccurate?

A That is right.

Q Now, the next subject matter to which I would like to direct your attention is something I think which you took up under the heading of countervailing costs. Do you understand what I am referring to?

A Yes.

***

***

that?

A No, not at the moment.

Q Do you know what expense there would be in lets say, terminating a run of private label and commencing a run of Borden label?

A I don't know -- the record didn't go into that so I have no idea what was involved there.

Q Have you ever been in a milk processing plant?

A Yes, I have, not recently but sometime before.

Q You have never been, obviously, in the Borden plant, or have you?

A No.

Q Now, the other item you mentioned, I think, in connection with this matter of countervailing costs was the time spent, in your opinion, by Mr. Tarr, Mr. Gose, and perhaps other Borden personnel?

A Yes.

Q Do you remember that reference?

A Yes.

Q These gentlemen were at the Borden Central Office, were they not -- these were not Branch office employees?

A No, they were central office.

Q Could I again have you refer to A&P Exhibit 233, Mr. Lemberg. Let me direct your attention -- do you have it, Your Honor -- let me direct your attention to page 6.

Do you have that in front of you?

A Yes.

Q This represents various Chicago office costs that were allocated both to A&P and to the complaint customers, was it not, by Mr. Havemeyer?

A I believe part of this was distributed to O'Hare Branch customers.

Q In other words, he took these expenses, totaling $81,922.76, and determined how much of that would be applicable to O'Hare and then, by determining what percentage that was of the expenses otherwise allocated, he then allocated this to all customers, did he not?

A Yes, I believe that is the way it was done here.

Q So that a part of this went to A&P?

A Yes, some part of it did.

Q Now Account Location 730 Account 001, is an account which included some Chicago Office salaries, is it not?

A Which account was that, now?

Q The first one on page 16, which is Location 730, Account 001, Administrative?

A Yes.

JUDGE HINKES: Page 6, you mean?

MR. FALLS: I am sorry -- page 6.

By Mr. Falls:

Q That included salaries, did it not?

A Yes, I assume it did.

Q Well, if you might -- I have here A&P Exhibit 67, which is the Borden chart of accounts, and let me show you -- are you familiar with that?

A Yes, I have seen that.

Q That describes, does it not, the various Borden accounts by number and description?

A Yes.

Q If we look at that 730, one says Administrative Salaries, Supervision, does it not?

A Yes, that is what it says.

Q I guess I should have said 730-1-1, which, I think, appears on page 6 of A&P Exhibit 233, and there is also a reference here to an account called, Sales Overhead, which is the 5th one down. That also includes salaries, does it not?

A I would think so although I don't know, but I would assume so.

Q Now, presumably, Mr. Lemberg, the salary of men like Mr. Gose and Mr. Tarr would have been included in those accounts, would they not?

A I don't know -- they could well have been. I can't say whether they were or were not.

Q You have no reason to believe they were not?

A No, no more reason they were than they were not. I

1558

don't know whether their accounts are, again, carried at some other level. I don't know.

Q You don't know the accounting system that well to be able to tell us?

A That is right. I don't know whether those specific men were included in these expenses or not.

Q If those accounts did include the salaries of all of the people at the Head Office, presumably they included the salaries of a lot of people who had nothing to do with A&P?

A Possibly so, yes. At least, nothing to do directly with A&P.

Q In any event, if the salary of Mr. Gose, for example, was included in one of these accounts, then A&P was, then a part of that cost was allocated to A&P?

A Yes.

JUDGE HINKES: But your position is all of it should have been attributed to A&P. Is that it?

THE WITNESS: My point would be before this allocation was made on page 6, that that portion directly attributable to A&P should have been removed and charged directly to A&P.

By Mr. Falls:

Q If one were to take out the part of the Central Office cost allocable to A&P and allocate that as a direct cost, then would it not have been mandatory to take out the part attributable to the other customers and --

A I am not suggesting that could have been done. All I am suggesting is we do have information in the record that certain of these men devoted a good portion of their time exclusively to the A&P business. Mr. Tarr, for instance, testified to that effect, that a major part of his time was devoted that way. Then, it would seem to me it would be proper then that that part ought to have been charged directly to A&P.

Q But that would distort the study, would it not, unless you also then took out the part of this that had nothing to do with A&P. Is it fair to allocate directly those you can associate with A&P and then give them a share of the rest as well?

A No, to the extent that was done, if we do that with Tarr then we charge the rest of it directly to the other, rather than making -- based on some allocation base.

Q If you identified the people at the Central Office who served A&P and allocated those costs directly to A&P then you ought to take out of the allocation to A&P this kind of allocation?

A Then the balance of Mr. Tarr's salary should have been allocated to the Borden brand customer, or directly charged.

Q In order to make a fair allocation of some part of the salaries of individual men to A&P, wouldn't you want a time study to determine how they spent their time?

A Preferably but I think we have to admit that would not be practical in a case like this.

Q It is generally not feasible to allocate Central Office administrative costs as direct costs. Is that right?

A Usually that is the case but in situations where we have a Sales Manager or Vice President who handles certain accounts, we have no problem, we can charge it directly because we know what he does.

Q Is it not a generally accepted and indeed very common practice in cost accounting to allocate overhead costs of this kind on the basis of a percentage of costs previously allocated?

A That is very commonly done.

Q Isn't that the most common way to do it?

A I think it probably is.

Q Almost universal?

A Yes, it is the usual way to do it but I have to qualify that again only those that cannot be directly charged -- if you had some that must be directly charged then they have to be removed.

Q Now, another subject matter about which you testified was certain fringe benefits. Right?

AFTERNOON SESSION

2:00 p.m.

JUDGE HINKES: The hearing will be in order.

Mr. Soeffing.

MR. SOEFFING: I will call Roy H. Marquardt.

- -

ROY HENRY MARQUARDT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

JUDGE HINKES: Your full name, please.

THE WITNESS: Roy Henry Marquardt.

JUDGE HINKES: Would you spell that, please?

THE WITNESS: M-a-r-q-u-a-r-d-t.

JUDGE HINKES: Thank you.

DIRECT EXAMINATION

By Mr. Soeffing:

Q Mr. Marquardt, will you give us your present home address, please?

A Rural Route 7, Valparaiso, Indiana.

Q And are you presently employed, sir?

A Yes, sir.

Q Would you please give us the name of your present employer?

A Canteen Corporation.

Q Prior to working with them, sir, where were you last employed before that?

A I was self-employed with Borden.

Q And in that capacity, sir, what were your duties and responsibilities?

A Taking care of the store accounts.

Q Is that Borden store accounts?

(No audible answer.)

MR. SOEFFING: Let the record show he nodded his head yes.

JUDGE HINKES: Did you say you were self-employed?

THE WITNESS: Yes, sir.

By Mr. Soeffing:

Q When you had your association with Borden, Mr. Marquardt, which years did this cover?

A '65 to '70, thereabouts.

Q And when you served the Borden accounts to which you referred, what geographical area did this cover, sir?

A The Valparaiso area.

Q Is that Valparaiso, Indiana?

A Yes.

Q Now, when serving the Borden store accounts to which you referred, sir, what type of products did you deliver?

A All dairy products.

Q Is that milk and dairy products?

A Yes.

Q Which stores did you serve with these Borden milk and dairy products, sir?

A A and P and Tittle, Big Wheel, IGA.

Q Were these stores in the Valparaiso area that you mentioned before?

A Yes.

Q Now, could you explain to this court how you were compensated or the method by which you were paid?

A Well, you can say a point system or a commission basis.

Q So you were paid on a commission basis?

A I would say that that is true.

Q Now, Mr. Marquardt, you have previously mentioned the stores to which you delivered. How were these stores billed, sir?

A I would give them their billing ticket to be checked out, and it would be signed and the billing would go to Borden from me.

Q So there was a central billing system with Borden?

A Yes.

Q And if there was a billing error, whom would the stores contact?

A Borden.

Q Who set the wholesale prices or the prices to the stores for the Borden product if you know?

A Borden.

MR. SCHAEFER: Could we specify the stores on that, your Honor?

JUDGE HINKES: Can you specify the stores?

THE WITNESS: Well, what? Such as A and P of Valparaiso, Tittle's of Valparaiso.

MR. SOEFFING: That is fine for me. I think that is enough.

By Mr. Soeffing:

Q Now, Mr. Marquardt, restricting ourselves for the moment just to the A and P and the Joe Tittle stores in Valparaiso, what kind of delivery did you give to these two particular stores?

A Well, I had a four-day delivery, and then, later on in my services, I dropped it to a three-day.

Q From what period of time to what period of time, if you can remember, did you give the four-day delivery?

A I would say from '65 to '68, thereabouts.

Q Was this four-day delivery to both of the stores?

A Yes.

Q That is, both the Tittle and the A and P stores?

A Yes.

Q What happened from 1968 forward?

A I dropped down to a three-day.

Q Delivery?

A Yes.

Q Now, when you served these stores, Mr. Marquardt, what kind of service did you provide? What comprised your delivery methods?

A Getting the product into the coolers.

Q Did you do any in-store rotation?

A No.

Q And did you give the same service to both the A and P and the Tittle stores?

A Yes, sir.

Q Now, Mr. Marquardt, do you know what I mean by "a returns policy"?

A Not really.

Q All right. Let me rephrase my question, then. What was the policy of the Borden Company with regard to outdated milk?

A I was not responsible for outdated milk.

Q What do you mean when you say you were not responsible?

A That belonged to the store when it was brought in and, if it outdated, I didn't carry that.

Q In other words, if there was a problem about dated milk once it was delivered to the stores --

A It was theirs.

Q -- it was their problem. What about problems which arose with regard to leakers or other faulty-manufactured milk and dairy products?

A That I replaced.

Q With regard to both of the stores, A and P and Tittle?

A Yes.

Q Now, how did these stores order their product for future deliveries? Can you tell us something about that?

A I done all buying of milk and dairy products.

Q In other words, you figured out the future orders for the stores?

A Yes.

Q And that was for both A and P and Tittle?

A Yes.

Q Now, Mr. Marquardt, if you can tell us, which was your largest-volume customer or the largest-volume customer of Borden in this Valparaiso area?

A Tittle's.

Q And can you give us a fairly good estimate of how much larger Tittle's took than some of the other stores? Just the A and P stores.

MR. DEMBROW: Can we have a time frame, please?

MR. SOEFFING: Certainly. Let us say in the year 1965-66.

THE WITNESS: Now you changed your question on me.

MR. SOEFFING: Strike the question and let me rephrase the question.

By Mr. Soeffing:

Q You have stated for us that Tittle was your biggest customer?

1567

A Yes.

Q Comparing this Tittle store to the A and P store for the period 1965 to 1970, can you tell us approximately how much more volume the Tittle store took than the A and P store?

A Well, four to one.

Q Four to one what? The Tittle store took four times as much as the A and P?

A Say 1,000 per week against 4,000 per week.

Q And the 4,000 per week is for Tittle?

A Yes.

Q And the 1,000 per week is for A and P?

A Yes.

MR. SOEFFING: Your Honor, I don't think we have any more questions. We would just like to confer here for a few seconds to make sure.

JUDGE HINKES: Very well.

By Mr. Soeffing:

Q One more question, Mr. Marquardt, if we could. Did you get the same commission or compensation per point on the delivery to both the A and P and the Tittle stores?

A No.

Q What was it? What was the difference?

A Well, it varied at different times.

MR. SOEFFING: No further direct examination, your Honor.

1568

XX

JUDGE HINKES: Mr. Schaefer.

CROSS-EXAMINATION

By Mr. Schaefer:

Q Mr. Marquardt, I want to ask you a couple of questions so there will be no misunderstanding on your role. You described yourself as being self-employed at the outset. Are we to understand from that that you did not receive a salary or hourly wage from Borden during the period of time from 1965 through 1968?

A I never did, no.

Q Did you pay your own social security?

A Yes.

Q And you owned your own truck?

A Tractor-trailer, yes.

Q You would describe yourself as an independent operator, independent distributor, is that correct?

A Yes.

JUDGE HINKES: I have heard the expression "vendor." Is that another name for it?

THE WITNESS: Oh, some may refer to that as another name, yes -- vendor, distributor.

By Mr. Schaefer:

Q You mentioned that there were certain store customers to which you delivered milk products for Borden. On those store customers, you indicated that you were compensated by what is variously described as, I think mostly, a commission basis. I think we need to clarify that. Was that a commission basis based on the dollar amount of sales or was it a payment to you based on the number of points which you delivered?

A On the number of points, so much per point.

Q I see. Now, were there other accounts that you served which you did not serve on this payment-per-point basis that you have described as to A and P and Tittle?

A Yes.

Q As to those accounts, did you purchase the milk from Borden and then resell the milk to them at the price you set?

A Yes.

Q Who did the billing on those accounts?

A I.

MR. SCHAEFER: I have no further questions, your Honor.

MR. DEMBROW: Your Honor, if I might have a few minutes.

JUDGE HINKES: Very well.

(A short recess was taken.)

MR. DEMBROW: Thank you, your Honor. Before I begin, may I just again ask complaint counsel if there has been any interview report of this witness that has not been provided to us? I believe we have been provided copies of one handwritten report. If there are any others.

MR. MATHIAS: Your Honor, there is an interview report which was not turned over to A and P on the grounds that it was not a statement of the witness and it is one which you reviewed in response to A and P's request for a subpoena and the request was denied.

JUDGE HINKES: That should be placed with the others as part of Exhibit 261.

MR. MATHIAS: We will do so.

MR. SCHAEFER: The request for these interview reports was also denied in conjunction with our request for subpoena and, in that regard, it is being kept with the others for both purposes.

JUDGE HINKES: Yes.

By Mr. Dembrow:

Q Mr. Marquardt, you stated that you delivered to an A and P store in Valparaiso, Indiana. Was this the ~~Indiana~~ only A and P store that you delivered to?

A Yes.

Q To your knowledge, is this the only A and P store in Valparaiso, Indiana?

A Yes.

Q Mr. Marquardt, when you served this A and P store, did you ever provide promotional material, signs, to this store?

A No.

Q And was this during the period of time that the A and P store was receiving private-label milk?

A Yes.

Q During this period of time, Mr. Marquardt, did you provide promotional material such as signs and so forth to the other stores that you served?

A Yes.

Q Mr. Marquardt, I believe you stated that, in regard to ordering of milk and dairy products, that you did the ordering for the various stores that you served.

A Yes.

Q Did the A and P store, during this period of time, follow a practice of preordering milk and dairy products?

A No.

Q When you visited the A and P store that you served, was there a card or document that was waiting for you in the store listing the amounts of each product that was required?

A No.

Q Are you familiar with a document that was used in this A and P store called a control card?

A No.

Q Mr. Marquardt, in regard to the A and P and Tittle store that you served in Valparaiso, I believe you stated that you eventually forwarded the tickets listing the amount of merchandise to Borden's offices; is this correct?

A Yes.

Q Did you have anything to do with the billing for these stores apart from sending that ticket in to the office?

A No.

Q Mr. Marquardt, I believe you stated that you provided four-day delivery to both the A and P store and the Tittle store in Valparaiso until some point in '68.

A Yes.

Q Are you sure or is it your best recollection that the three-day delivery did not come in until 1968?

A I can't answer that one. I am not sure.

Q Could the three-day delivery to A and P have come in at some earlier point in time?

A I really don't know.

Q Mr. Marquardt, I would like to show you a copy of an exhibit which is in evidence as CX-75-G and just ask you to read over this one page, especially calling your attention to the date at the top of the page and the reference to the city of Valparaiso halfway down the page.

JUDGE HINKES: Are we sure that has been received in evidence?

MR. MATHIAS: We will check that, your Honor.

JUDGE HINKES: Yes; I have found it.

MR. DEMBROW: Through Mr. Tarr, I believe.

MR. MATHIAS: Yes, it was received in evidence except for any handwriting on it.

By Mr. Dembrow:

Q Mr. Marquardt, in reviewing this page identified as CX-75-G, does that refresh your recollection in any way as to when the A and P store in Valparaiso began receiving or at least was receive three-day delivery?

MR. SOEFFING: Your Honor, I am going to object to that for this reason: Mr. Marquardt was not the usual Borden-type driver. He has testified he was an independent distributor servicing Borden accounts, and there is no evidence in the record laying a foundation to show that the three-day delivery being made in Valparaiso was in any way connected with Mr. Marquardt.

JUDGE HINKES: In any event, the document may be shown to the witness to refresh his recollection, which apparently is not quite complete here and now, so I will have to overrule the objection.

MR. DEMBROW: Thank you, your Honor.

By Mr. Dembrow:

Q Mr. Marquardt, does this document refresh your recollection in any way?

A Well, I can't recall seeing one back then.

Q No, I am not asking you if you saw this. I am just asking you whether or not seeing this page with the date and the reference to the city of Valparaiso -- whether or not this refreshes your recollection as to when the A and P store in

Valparaiso that you served began receiving three-day delivery or was receiving three-day delivery.

A No.

MR. DEMBROW: Your Honor, I have no further questions.

MR. SOEFFING: Your Honor, just several very brief questions on redirect.

REDIRECT EXAMINATION

By Mr. Soeffing:

Q Mr. Marquardt, you stated, in response to a question by me, that you were paid on a point basis and, in response to a question from Mr. Schaefer, that you were not paid on a salary or hourly-wage basis. By this, do you mean that you were paid on the volume delivered to the various stores and not on delivery time expended?

A I was paid on the point system, not on volume of time spent.

Q You were paid on the volume of purchases of the store, not in the volume of time?

A Right.

Q Now, Mr. Marquardt, during the period 1965 through 1970, did you deliver private-label products at any point to the A and P Valparaiso store?

A Yes.

Q' And during that same period of time, did you continue to deliver Borden-label products to your other accounts?

A Yes.

Q And included in the other accounts were the Tittle stores?

A Yes.

Q At any time during the 1965 through 1970 period, did the delivery of private-label products to the A and P store cause you any problems in servicing or delivering to those stores?

A I don't know how to answer that one really. If you could state that a little differently perhaps.

Q Yes.

MR. DEMBROW: Your Honor, I really don't think that these questions were at all raised on cross-examination by either of respondents.

MR. SOEFFING: Your Honor, yes, they were.

JUDGE HINKES: Well, there is no pending question at the moment. Let us wait and hear what the next question will be.

By Mr. Soeffing:

Q Let me rephrase the last question I put to you. Was the ordering of the private-label products for the A and P Valparaiso store any more difficult than the ordering of Borden-label products for your other accounts, including Tittle?

A Yes.

Q In what way? Can you explain to us your answer?

A Well, had I bought too heavily for A and P, I had a sale for the Borden label but I wouldn't have if it were the A and P label.

Q In other words, if you had overbought on the Borden label for one customer, you could sell that to another, is that right?

A Yes.

Q You could sell that to another customer?

A Yes.

Q But if you had overbought on the A and P label, then you could not sell it to another customer because it was private-label; is that your answer?

A Right.

MR. SOEFFING: No more questions, your Honor.

JUDGE HINKES: You made some reference to supplying promotional material to your stores but not to the A and P store. What sort of promotional materials are you speaking of?

THE WITNESS: Oh, say Tittles ran a cheese sale, so you had a small banner, "One pound cheese, 29 cents," a picture of the carton and such.

JUDGE HINKES: Well, now, A and P bought its own private-label products as well as some Borden products, didn't it?

THE WITNESS: It was mainly private-label.

JUDGE HINKES: But there were some with the Borden label, right?

THE WITNESS: Perhaps one item.

JUDGE HINKES: Did you ever have any promotion on that for A and P?

THE WITNESS: No.

JUDGE HINKES: Is there anything else?

MR. SCHAEFER: No, sir.

JUDGE HINKES: Thank you. You may step down, Mr. Marquardt.

(Witness excused.)

JUDGE HINKES: Do you have anything else to present this afternoon?

MR. MATHIAS: Your Honor, there are no other witnesses this afternoon and I have nothing to present at the moment. I prefer to take the rest of the afternoon in preparation of tomorrow.

JUDGE HINKES: I believe our next witness is scheduled for tomorrow morning and we have made our tentative arrangements at any rate for Thursday and Friday. I think we all understand that situation now. We will therefore recess at this time and resume tomorrow morning in this room at 10:00 a.m.

(Whereupon, at 2:45 p.m., June 26, 1973, the hearing in the above-entitled matter was recessed, to reconvene at 10:00 a.m., June 27, 1973.)

- - -

THE WITNESS: I believe the question was how important?

MR. MATHIAS: Yes, sir.

By Mr. Mathias:

Q How important is purchase price to your company with relation to your ability to compete?

A Most important.

Q Do you consider discounts or rebates of one or two percent on any product to be important?

A Yes.

Q What is that, sir?

A The nature of our business, we let profit -- operate on less than net, many times.

Q Now, how important is milk to your operations?

A Very important.

Q And why is that, sir?

A It represents a good share of our total volume. It's an item that people use everyday and if we are price competitive, it will bring them to the store more often.

Q Are discounts and rebates on milk and dairy products important to your operation?

A Yes.

Q Why is that, sir?

A Well, it allows us to stay competitive.

Q Would discounts and rebates on milk and dairy products-

MR. MATHIAS: All right.

By Mr. Mathias:

Q Mr. Minard, during the periods October '66 through March '67, and June '69 through March of '70, what corporate chains were doing business in the Hammond-Highland area?

A A & P, Kroger, Jewel -- if you call them corporate chains, Burger -- there is Stracke and Vantil; in the Hammond area, Pay-Low --

Q And --

A -- that is about it.

Q -- in the Gary area, what corporate chains were doing business during these same time periods?

A A & P, National Tea, Kroger, Jewel, Buy Low, Wise Way, Thrifty-Mart, Tiptop. That is about it.

Q And in the Valparaiso area, what corporate chains were doing business in these two time periods?

A National, A & P, and an independent named Millers.

Q That was just a one-store independent?

A One-store independent.

Q Now, sir, during these time periods, October of '66 through March of '67 and June of '69 through March of 1970, what effect would it have on your business if you sold milk at a price higher than that charged by the corporate chains in these market areas we have named?

MR. CURNIN: Objection, your Honor; still a hypothetical question.

MR. SCHAEFER: Same objection.

JUDGE HINKES: Overruled.

THE WITNESS: It would hurt our business.

By Mr. Mathias:

Q Are you familiar with the term "loss leader" as it is used in grocery merchandising?

A Yes, sir.

Q And what does it mean, sir?

MR. CURNIN: Objection, your Honor, if we are again falling back into the general grocery line, and we are not talking about milk and dairy products.

Mr. Mathias: Your Honor, these are strictly preliminary questions.

MR. CURNIN: But are they probative, and are they relevant?

JUDGE HINKES: Well, I do think we should first get some understanding as to the meaning of the word, and then we will expect some greater specificity --

MR. MATHIAS: Yes, sir.

JUDGE HINKES: -- which I would expect will be forthcoming.

I will overrule the objection.

THE WITNESS: A loss leader is an item that we seel at retail for less than it cost us.

By Mr. Mathias:

Q And why do you do this, sir?

A To draw customers and create volume.

Q Now, is milk sometimes used as a leader, as a loss leader in the market areas in which your stores are located during this period, these two time periods?

A Yes, sometimes.

Q Now, sir, if you received a lower purchase than your competitors on milk and dairy products, what competitive advantage, if any, would it give to your stores?

MR. CURNIN: Objection, your Honor; hypothetical.

JUDGE HINKES: Overruled.

THE WITNESS: We could sell our milk for less than our competitors.

By Mr. Mathias:

Q Sir, are you familiar with the Tittle Company's dairy purchasing practices during the period October of '66 through March of '67, and June '69 through March '70?

A Yes.

Q Now, in connection with your purchases from the Borden Company, how were you billed by Borden?

A Weekly.

Q That would be a weekly invoice?

A Right, um-hmm.

Q Did you receive rebates or discounts off of the invoice -- off of the invoice price?

A Yes.

Q Now, in the period October of '66 through March '67, did you receive rebates or discounts for your stores locatdd at, in Highland, in Hammond and the two stores located in Gary?

A Yes.

Q How often were those discounts or rebates paid?

A Monthly.

Q And how were they paid, sir?

A As I recall, they were based on a four cent per gallon and two cents per gallon.

Q Per gallon or half gallon?

A Per half gallon basis, one check distribution for the four stores, the total number purchased, in other words.

Q And approximately when would you receive a check for a particular month, say, take October of '66, when would you receive your rebate for the October '66 purchases?

A Well, as I recall, usually in the middle of the next month, or toward the latter part.

Q Now, during the same time period, October '66 through

March '67, did you receive a rebate or discount off of the invoice price for the Valparaiso store?

A No, I did not.

Q The Valparaiso store was billed net?

A Right.

Q Now, during the period June '69 through March 1970, did you receive rebates off of the invoice price for the Highland store and the two Gary stores?

A Yes.

Q And how were these rebates paid, sir?

A They were paid monthly, individual checks to the three stores involved.

Q And was there any change in the basis -- was it still on this cents off per gallon and half gallon basis?

A No. At that time it was a 2 percent of total purchases during that accounting period.

Q And again when would you receive -- how would you be paid this rebate?

A By check.

Q And was it a check -- were there three separate checks or one check?

A Three separate checks.

Q And when would you receive the check for a particula month, say the June '69 rebate, approximately when would you receive the rebate checks for those three stores?

A Oh, sometime during the next month, usually the middle of the month or the latter part.

Q Now, during this period, June '69 through March 1970, did you receive any rebates off the invoice price for the Valparaiso store?

A No.

Q So again the Valparaiso store was billed net?

A Right.

Q Did you also purchase ice cream from Borden?

A No.

Q Now, Mr. Minard, did you pay, during these two time periods, October '66 through March '67, and June '69 through March '70, did you pay your Borden bills promptly?

A Yes.

Q Was your credit rating with Borden good, to your knowledge?

A Yes, I think so.

Q And to your knowledge were there any added expenses of collection from you by Borden?

A No.

Q Now, sir, in connection with an earlier question, we asked you to name certain corporate chains in the three market areas.

Q Just Borden?

A Um-hmm.

Q And would that be true through the period '66 to '70?

A '66 through '70, I believe we -- it seems that we quit buying from Borden in our Valparaiso store in January of 1970.

Q In January of 1970?

A I think that's correct.

Q And who became your dairy supplier at that time?

A Home Dairy.

Q H-o-m-e?

A Right.

Q Are they a local dairy, sir, as you would describe it, or --

A No, they are not.

Q Where do they operate from?

A From Bern, Indiana.

Q Bern?

A B-e-r-n.

Q And how far away is that from your Valparaiso store?

A Approximately 120-30 miles.

Q During the period 1966 through 1970, was Home Dairy operating in the Valparaiso area?

A No.

Q When did they come into the Valparaiso area?

A Well, they weren't, to the best of my knowledge; I assume that they came into the Valparaiso area when they began delivering milk to us.

Q You don't recall their being in the area servicing others, or soliciting customers prior to January of '70?

A Not to my knowledge.

Q When were you first solicited by Home Dairy?

A Some time in 1969, I think.

Q Beginning of the year, middle of the year?

A I have no idea.

Q Did you handle the negotiations, sir?

A Yes.

Q Would it have been in the second half of 1969?

A More than likely, yes.

Q Did Home Dairy offer to serve any of your other stores, and specifically, your stores in Gary and Highland'

A Yes.

Q Did you switch to Home Dairy in January of 1970 because they offered you a better price --

A Yes.

Q -- than you were then paying the Borden Company?

A Yes.

Q And did they offer you any additional services or other benefits?

ch12

A Yes, weekly specials.

Q Anything else, sir?

A No.

Q Is the method of delivery by Home Dairy to your Valparaiso store the same as it was when you were receiving milk from the Borden Company?

A In Valparaiso, Yes.

Q Yes.

So that you switched to Home Dairy because they offered you weekly specials, and better milk prices and better prices on dairy products?

A Right.

Q When you stopped dealing with Borden in January of 1970, was there any equipment or whatnot on the premises that you had to return to the Borden Company?

A Yes, there was equipment on the premises.

Q What equipment was returned to Borden in January of 1970?

A There was no equipment returned in January.

Q I may have misunderstood your testimony, sir. I thought there was some equipment on the premises that was returned to Borden at this time.

A No, I am sorry. I misunderstood the question.

There was some equipment belonging to Borden on the premises.

Q Well, in January of 1970 did they pick that equipment up?

A No, they did not.

Q They left their equipment there?

A Yes.

Q Did you buy it from them?

A No, I have not.

Q The quipment still belongs to Borden?

A Yes.

Q Have there been any discussions between you and Borden as to the return of the Borden equipment?

A Yes.

Q And can you tell us about those discussions, sir, what they said to you and what you said to them?

A Well, there has been a long range of discussions immediately thereafter, after the change, suggested by them They would -- we haven't determined what the equipment is.

Q Yes, will you identify the equipment for us?

A Okay.

The equipment is a dairy cooler.

Q Used for what purpose, sir?

A For milk storage and dairy products storage.

Q Is this a walk-in cooler?

A Yes.

Q How big is it?

A (No response.)

Q In approximate square feet, is it ten feet wide and twenty feet long?

A I would say ten by sixteen.

Immediately after we left, quit buying from Borden and Company in Valparaiso, the discussions of the cooler came up, and it was decided then by Mr. Joe Hines, who worked for Borden at that time -- and still does -- that perhaps he would just leave it there for a while, and we will think about it, and maybe we won't continue buying from Home, we will go back with Borden, and so that kind of rested for a long while.

Subsequent discussions were "how about buying it?"

"No, I don't want it. How much do you want for it? That is too much. Come and take it out."

"Well, let's let it go for a while."

That is still going on at the present time.

Q That is the present status?

A Right.

Q Is it still being used by you, sir?

A Yes.

Q When did you receive this dairy cooler from the Borden Company?

A It was in two stages. Dates are pretty tough.

It seems like 1967 they placed a dairy cooler outside the store. At a later time, when we were remodeling, they added to that same dairy cooler, and it was placed inside a newly-built back room area.

Dates escape me.

Q But your recollection is now that you received a cooler from them in 1967?

A Yes.

Q And when did you remodel the store, sir?

A In '69, I believe.

Q And then did they transfer that outside cooler into the remodeled area, or did they bring in a new cooler?

A We merely built around it, and they enlarged the same cooler that was on the outside.

Q They enlarged the capacity of the cooler --

A Right.

Q -- that you had for a two-year period?

A Yes, sir.

Q Did you have the use of this cooler without charge from the Borden Company?

A Yes.

Q Did they -- and by "they", I mean the Borden Company, did they maintain it?

A No. It was our obligation to maintain it.

Q You maintained it and you supplied the electricity?

A Right.

Q In 1969, did you enlarge the Valparaiso store?

A Yes.

Q And in addition, did you modernize it?

A Yes.

Q And did you do so to take advantage of the increased business that that store was experiencing in an effort to further increase the business?

A Yes.

Q What?

A Yes.

Q How large was the store, sir, prior to its enlargement in 1969?

A Approximately 25,000 square feet.

Q And it was increased to what size?

A 35.

Q You testified, I believe, that the Home Dairy offered to serve your stores in Gary and in Highland in 1969; is that true, sir?

A Right.

Q But you decided not to take them up on that offer?

A That's right.

Q And why was that, sir?

A It was a new dairy. We didn't know how it would do. We decided to try it in one store and see how it worked out.

Q How has it worked out in your Valparaiso store?

A Extremely well.

Q Have you transferred them, or given them additional stores to service?

A Yes.

Q And what stores are they serving now?

MR. MATHIAS: Your Honor, I am going to object to this further line of questioning because it obviously goes beyond the 1970 period -- at least it appears to me that it does.

Complaint counsels evidence only goes through March of 1970, and this inquiry would appear to be irrelevant to the issues of this case.

JUDGE HINKES: It seems you are going beyond the 1970 period.

MR. CURNIN: May we determine, your Honor, from the witness just when the changes occurred?

JUDGE HINKES: All right.

MR. CURNIN: And if it's beyond the period, then it's beyond the period.

THE WITNESS: June of '70, as I recall.

By Mr. Curnin:

Q June of '70?

A Right.

Q In June of 1970, what stores did they commence serving?

MR. MATHIAS: Your Honor, I'm going to object.

JUDGE HINKES: I believe you have the cutoff of March, '70, don't we?

MR. CURNIN: Well, we do, your Honor. However, I think I'm entitled, as a background question, to find out when the stores, or the service to the stores started, and then to go back as to when the negotiations commenced and when they decided to accept.

MR. MATHIAS: Your Honor, I'm not too sure --

MR. CURNIN: And I think that that's relevant, for obvious reasons.

MR. MATHIAS: Your Honor, those obvious

reasons escape me completely. I don't see what difference or what bearing on this case this witness' dealings with Home Dairy have at all. I -- so I do not believe that the relevance is so obvious.

JUDGE HINKES: I'm going to sustain the objection to the question.

The question as now posed is fairly narrow. The inquiry is whether -- is as to what stores began receiving the Home Dairy milk in June, 1970. Now, that, I think, is totally irrelevant, and I think that I must sustain the objection.

By Mr. Curnin:

Q Did you, prior to March of 1970, enter into negotiations with the Home Dairy to supply your two stores in Gary and/or your store in Highland?

A Yes.

Q And when did you enter into those negotiations, sir?

A They were going on continually.

Q Starting at what time?

A Sometime in the latter part of '69.

Q And the Home Dairy offered to sell milk to all of your stores at a price below that which was then being charged to you by the Borden Company?

A Yes, sir.

Q Did you enlarge and/or modernize any of your other

Q Did you receive special deliveries in your stores in Gary from Borden?

A Yes.

Q Did you receive --

A On occasion.

Q Did you receive special deliveries from Borden in your store in Highland?

A Yes, on occasion.

Q And your store in Hammond, when you had one open in that area?

A Yes.

Q And your store in Valparaiso?

A Yes, on rare occasions.

Q And how was the milk delivered? Was it delivered into your cooler in all of your stores?

A Yes.

Q And on occasion, would the driver place the milk in the dairy case in all of the stores?

A On occasion.

Q And would he on occasion in all of these stores rotate the stock?

A Likewise, on occasion.

Q And did Borden's salesmen call on these stores during this period of time, '66 to '70?

A Not to my knowledge. The salesmen would call on myself. I always assumed they did. Whether they did, or how often they did, I don't know.

Q But Borden salesmen would call on you, sir?

A Oh, yes.

Q Who ran the risk of loss for spoilage during this period of time, '66 to '70?

A Generally, the dairy service.

Q During this period of time, did you get in-the-store promotional material from Borden for your five stores?

A Yes, on occasion.

Q And did they ever send around demonstrators to your stores?

A Yes.

Q And did you also receive weekly specials on dairy products?

A Yes, we did.

Q Five and ten cents off items?

A Generally not that much, but three to five.

Q Did you receive on occasion from Borden during this period of time in these stores free samples?

A Yes.

Q And did you receive from them assistance at the time of opening of a new store or the refurbishing of an existing store?

A Yes.

Q And what would that consist of?

A Well, generally during an opening, it would involve some free samples to pass out to customers as a giveaway, and, oh, help of one or two of their people for a few days, or one day during the opening, just general help to take care of their stock or help customers in general.

Q You mentioned that -- excuse me, sir.

A As I stated, the dairy cooler.

Q Pardon me?

A The dairy cooler that we have already talked about.

Q They would go in and rotate the stock?

A No, no. I mean the, allowing us to use a walk-in cooler.

Q Here you have reference to the walk-in cooler at the Valparaiso store --

A Right.

Q -- that you had starting in 1967?

A Um-hmm.

Q Did you have the use of coolers or other equipment in any of your other stores?

A No.

Q Was that the only store that received equipment for which no charge was made?

interest subsidy from the Borden Company during this period of time?

A Yes.

Q Would you explain to us what that represents, and how it was calculated?

A I don't know exactly how it was calculated. I can tell you the theory of it. It was a, simply a loan we, Joe Tittle and Sons borrowed, borrowed money, and for whic we repaid principal and interest. Borden subsidized the interest in some amount. I am not quite clear exactly how -- for example, if we paid seven percent, they perhaps reduced the interest payment by two percent.

The checks were, as I recall, decreasing in value each month through this period.

Q Did the interest subsidy payments vary --

A Yes.

Q -- during this six-month period?

A Yes.

Q And did you receive any interest subsidy payments, both before and after this period?

A Yes, we must have.

Q When did you take out the loan?

A I -- I can't -- I don't know that.

Q What was the amount?

A To the best of my knowledge, it was $700,000.

rh4

Q What bank?

A (Shrugging shoulders.)

Q You don't know, sir?

A I do not know.

Q Did Borden help Joe Tittle and Sons get this loan?

A I -- as I recall, they did.

Q And the interest subsidy was two percent, as best you can recall, on the total interest payments?

A As best I can recall.

Q And how often did the company receive that payment?

A Monthly.

Q And how was that money entered on the books?

A It was merely applied to that, that same account to reduce the interest payment.

MR. CURNIN: I ask Complaint Counsel if he has a copy of the Tittle Food Center's letter dated November 4, 1972, and if these documents were produced pursuant to a subpoena, I ask that we be shown a copy of the subpoena.

MR. MATHIAS: You mean this November 4, 1972 --

MR. CURNIN: Yes, that letter, if it was produced pursuant to a subpoena.

MR. MATHIAS: It was not produced pursuant to a subpoena.

I do have a copy of the letter here.

h5

MR. CURNIN: I would like to show it, and the attachment, to the witness.

MR. MATHIAS: You want the other copy as well, don't you?

MR. CURNIN: I have written on my copy.

MR. MATHIAS: There may be writing on this copy. Let me see.

There is -- if there is, I have no objection to him looking at it. There is writing on it.

MR. CURNIN: Is that an attachment to the letter?

MR. MATHIAS: That is -- these are some carbon copies -- I mean, some Xerox copies.

MR. CURNIN: Of the same letter?

MR. MATHIAS: Of the same attachments. I do not have any cleaner copy than that.

MR. CURNIN: No, but the letter in front of you, or the document in front of you looks to be different from the documents that I have in my hand.

MR. MATHIAS: Those are my own personal notes, Mr. Curnin. Would you like to look at them? You may not.

MR. CURNIN: If it may be relevant, it may be worthwhile.

By Mr. Curnin:

Q I show you this document and ask you if you are

h6

familiar with the -- I have a copy, your Honor -- are you familiar with the records which are attached --

MR. MATHIAS: Your Honor, I would object to the characterization by this witness of what is attached to that letter.

JUDGE HINKES: Well, the witness hasn't been asked to characterize.

MR. MATHIAS: No, but Mr. Curnin, in his question, has characterized the attachments to that letter as records.

JUDGE HINKES: Well, let's just ask the witness, then, if he is familiar with the attachment to the letter, what appears to be a three-page attachment.

THE WITNESS: Yes.

By Mr. Curnin:

Q Can you describe the first two pages that are annexed to this letter dated November 4, 1972?

A The interest expense and interest return? Is that the --

Q No, the -- all right. That is not the first one that I have, but going to that page, sir, which is headed "Ledger," --

A Um-hmm.

Q -- interest expense and interest return, what does that represent?

A It looks to me like the interest expense and interest return from Borden on the loan that we were discussing.

Q In other words, under the column "Credits," those are the payments you received from Borden which you have described as being an interest subsidy for the period of time specified, September '65 through August of '66?

A Right. Yes.

Q Will you look at the other pages, sir, and tell me what information is reflected on those sheets?

MR. MATHIAS: Your Honor, I think --

THE WITNESS: I don't know.

MR. MATHIAS: -- the witness has not yet been qualified to respond to those, to a question as to those sheets. It hasn't been shown that he is familiar with these particular sheets.

JUDGE HINKES: There is nothing to indicate that this witness is at all involved in this communication, and he is not qualified to explain it, unless he has some personal knowledge.

By Mr. Curnin:

Q Have you seen these sheets before?

A No, I have not.

Q Do you know what form the company recorded rebate payments received from Borden?

A In a ledger.

rh6

A Not absolutely.

Q There is an entry on 30-C, No. 8, Bordens, and is that the interest payment again?

A Yes, again, correct.

Q To your knowledge, does Respondent A&P Exhibits 30 and 31 represent the interest payments and rebates that the company received from Borden?

A Yes.

Q Do you know whether or not it's a complete record of all the payments that you received from the Borden Company?

A I don't know. I would presume that it is.

Q You did not prepare the record?

A No.

Q I notice there is an entry here on 30-G, Borden Valparaiso, $25.

What does that represent?

A I could only guess that an amount like that would be a payment for a demonstrator or -- and/or product used in a one-day sale, or something like that, or perhaps we used our own.

Q But a rebate you received from the Borden Company --

A Yes.

Q -- applicable to your Valparaiso store?

A That would be different than the others.

1604

Q My description of it is correct?

A Yes.

MR. MATHIAS: Your Honor, I -- I would strongly protest Mr. Curnin's describing the documents, figures herein.

The witness has stated that it is different from the other. I believe that if he wants to find out what this is about he should ask the witness rather than testifying himself on the record.

JUDGE HINKES: The question was a little confusing, Mr. Curnin. When you said that your description was correct, what description were you referring to?

MR. CURNIN: I will go over it, your Honor. I thought that it was clear. I will have to go back now and find it.

dsl

MR. CURNIN: Q There's an entry here on 30G, Item 3 for the Borden Company, $25 from -- which is applicable to the Valparaiso store.

A Right.

Q And that represents a rebate or a payment which you received --

MR. MATHIAS: Your Honor, I object again to his characterizing it. He should ask him what it is.

MR. CURNIN: Well, the witness has already testified what it is. There's no confusion as to the record on that testimony.

MR. MATHIAS: But he has not characterized it as Mr. Curnin is now characterizing it, your Honor.

JUDGE HINKES: Well, it's still cross examination, Mr. Mathias, and it's permissible.

MR. CURNIN: Would you read the question?

(Question read.)

MR. MATHIAS: Now, your Honor, I would object on the grounds that it's a dual question. He said "rebate or payment you received". Now, I do not believe that it's a sufficiently clear question.

JUDGE HINKES: Well, if there's a difference, I think we ought to be clear about that.

By Mr. Curnin: Q Mr. Minard, this $25 payment which is applicable to your Valparaiso store was a payment you received in connection with your dealings with the Borden Company?

A If it's entered in that ledger, and that's a copy of our ledger, that would be a payment received from Borden Company.

Q And it's a payment received in connection with your purchases of milk and dairy products from the Borden Company?

A I don't know that for sure.

Q Were you buying other products from the Borden Company other than milk and dairy products?

A No.

Q So wouldn't it be correct to say, sir, that it would have to have been received in connection with your purchase of milk and dairy products from the Borden Company?

A In connection with our purchase, yes.

Q There's an entry on 310, and I can't read which item it is, but it says "Borden, Inc.", and then there's a dollar payment $65.49.

Can you tell me what that was for, sir?

A I can't identify that.

Q Did the Borden Company offer Tittle a private label milk and dairy product during the period '66 through '70?

A Yes, sometime in that period it was discussed.

Q And did other dairies offer you a private label during the same period of time?

A Not that I recall.

Q Was the Tittle business profitable and growing during this period?

A '66 through '70?

Q Yes, sir.

A Yes.

Q And the dairy business, the milk and dairy business, it was growing and it was profitable?

A Yes.

MR. CURNIN: No further questions.

JUDGE HINKES: Mr. Schaefer.

CROSS EXAMINATION

By Mr. Schaefer:

Q Mr. Minard, you spoke this morning about you or your store managers or store personnel regularly comparing out-of-store or retail prices of your competitors in the various areas where your stores were located.

Were these comparisons made in writing?

A Yes.

Q And am I correct in understanding from the subpoena directed to Tittle that for the period 1964 through 1966 that you no longer have copies or have not retained copies of these reports?

A No.

documents which I have just shown to the witness.

(The papers referred to were marked Commission's Exhibits 270-A through M for identification.)

By Mr. Mathias:

Q Now, sir, in connection to -- with -- or strike that.

Mr. Curnin asked you this morning whether or not you or the dairy had the expense of returns for out-of-date merchandise, and you answered, I believe, generally the dairy.

Now, were returns of out -- how big a volume did you have of returns of out-of-date merchandise?

A Well, very small volume of out-of-date merchandise. Sometimes there was damage, or a particular product that would go bad, but very rarely out-of-date.

Q Now, at the Valparaiso store, Mr. Curnin asked this question in general reference to all of these stores, did this same hold true in the Valparaiso store -- that is, if there was some out-of-date merchandise, that the -- that Borden was responsible for it?

A To my knowledge, generally, yes; Borden or the -- or the vendor-supplier.

Q Now, in response to some questions from Mr. Curnin, it was mentioned that Borden supplied demonstrators to you.

Goldner Press, Inc. Law and Financial Printers WO 6-5525